Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSE MARTIN AVELAR-CRUZ and GARY LAGUERRE,

Petitioners,

v.

JANET RENO, as Attorney General of the United States; DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service; BRIAN PERRYMAN, as Chicago District Director of the Immigration and Naturalization Service; and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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APPENDIX A

In the

United States Court of Appeals

for the Seventh Circuit

No. 98-1954

GARY LAGUERRE,

Petitioner-Appellant,

v.

JANET RENO, *et al.*,

Respondents-Appellees.

No. 98-2613

JOSÉ MARTIN AVELAR-CRUZ,

Petitioner-Appellee,

v.

JANET RENO, *et al.*,

Respondents-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 97 C 8225 and 98 C 1193 –
Suzanne B. Conlon, *Judge.*

ARGUED OCTOBER 29, 1998 – DECIDED DECEMBER 22, 1998

Before POSNER, *Chief Judge*, and HARLINGTON WOOD, JR., and MANION, *Circuit Judges.*

POSNER, *Chief Judge*. We have consolidated for argument and decision two immigration cases that present overlapping issues. In one, Gary LaGuerre sought habeas corpus in federal district court under 28 U.S.C. § 2241, challenging the refusal of the Board of Immigration Appeals to consider his application for a waiver of deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994 ed.). Section 212(c) (since repealed and replaced by a new, but basically similar, section, § 240A(b), 8 U.S.C. § 1229b(o)) grants the Attorney General (or the Attorney General's delegates, such as the Board of Immigration Appeals) discretion to waive deportation because of extraordinary hardship to the deportee or his family, or other exceptional circumstances. *Lovell v. INS*, 52 F.3d 458, 461 (2d Cir. 1995). LaGuerre had been ordered deported because he had been convicted of certain drug-related offenses, and section 440(d) of the Antiterrorism and Effective Death Penalty Act, enacted in 1996, amended section 212(c) of the Immigration and Nationality Act to bar waivers of deportation for aliens ordered deported on the basis of such convictions. The Act was passed while the deportation proceedings against LaGuerre were pending; nevertheless the Board of Immigration Appeals held that section 440(d) applied to him. The district court agreed, and LaGuerre appeals.

The other case differs primarily in that the alien, José Martin Avelar-Cruz, prevailed in the district court by convincing the judge that section 440(d) denies equal protection of the laws because it bars waiver only for aliens deportable on the basis of particular offenses and not for aliens excludable from the United States on the

basis of the same offenses. If, before deportation proceedings had been instituted against Avelar-Cruz, he had left the United States and then tried to reenter, and exclusion proceedings had been instituted against him, he could, if ordered excluded, have applied for a waiver of exclusion. The Department of Justice has appealed from the judgment in Avelar-Cruz's case.

The issues common to both cases are whether the district court had jurisdiction and if so whether section 440(d) applies to proceedings that were pending when it was enacted. A third issue, presented only in Avelar-Cruz's case, is whether if there is jurisdiction and section 440(d) is applicable to this case, the section is unconstitutional.

Until 1961, the mode of judicial review of deportation orders was by habeas corpus, or, after 1952, by declaratory judgment actions, in federal district courts. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Heikkila v. Barber*, 345 U.S. 229 (1953). In 1961 Congress made review of such orders by the courts of appeals, without preliminary recourse to the district courts, the exclusive method of judicial review. Immigration and Nationality Act, § 106, 8 U.S.C. § 1105a (1994 ed.). The purpose of consolidating review in the courts of appeals and thus cutting out the district courts was to thwart the dilatory tactics frequently employed by the lawyers for deportable aliens. *Foti v. INS*, 375 U.S. 217, 225-26 (1963). The right of habeas corpus was preserved, however, in section 106(a)(9) of the Act, 8 U.S.C. § 1105a(a)(9) (1970 ed.) (later renumbered (10)); *Foti v. INS*, *supra*, 375 U.S. at 231 n. 19, and courts have struggled to reconcile this provision, which permits the alien

to proceed in district court, see 28 U.S.C. § 2241(a), with the overall statutory purpose. E.g., *Galaviz-Medina v. Wooten*, 27 F.3d 487, 489-92 (10th Cir. 1994); *Williams v. INS*, 795 F.2d 738, 743-45 (9th Cir. 1986). The best view is that the provision was intended to be limited to situations in which the alien was unable to obtain judicial review under the new statutory procedure, and should be interpreted accordingly. E.g., *Bothyo v. Moyer*, 772 F.2d 353, 355-56 and n. 1 (7th Cir. 1985); see *Kwok v. INS*, 392 U.S. 206 (1968); *Singh v. Waters*, 87 F.3d 346, 349 (9th Cir. 1996).

Thirty-five years later, section 440(a) of the Antiterrorism and Effective Death Penalty Act amended section 106 to provide that a "final order of deportation against an alien who is deportable by reason of having committed a [drug] offense . . . shall not be subject to review by any court." And section 401(e) also repeals section 106(a)(10) of the 1961 Act, the provision preserving a limited right to apply for habeas corpus. Nevertheless, several decisions in other circuits, as well as dicta in our decisions in *Chow v. INS*, 113 F.3d 659, 668-69 (7th Cir. 1997), and *Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997), hold that the closing of the door to judicial review in section 440(a) does not apply to habeas corpus. *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998); *Goncalves v. Reno*, 144 F.3d 110, 118-23 (1st Cir. 1998); *Magana-Pizano v. INS*, 152 F.3d 1213, amended, 159 F.3d 1217 (9th Cir. 1998) (per curiam). These courts point out that Congress did not amend the basic federal habeas corpus statute, 28 U.S.C. § 2241, which is broadly enough worded to encompass persons detained under an order of deportation while awaiting the execution of the order; and they worry that if section 440(a) did close the door to habeas corpus it

might violate the provision of the Constitution that forbids suspending habeas corpus other than in times of war or rebellion. U.S. Const. art. I, § 9, cl. 2. The Eleventh Circuit, however, has taken the opposite position, holding that section 440(a) does abrogate habeas corpus for aliens subject to it. *Richardson v. Reno*, No. 98-4230, 1998 WL 850045 (11th Cir. Dec. 9, 1998).

We doubt that the suspension clause requires preserving habeas corpus as a vehicle for challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is not in question. At the time the Constitution was enacted, habeas corpus was an extremely limited remedy. It lay only to test the jurisdiction of whatever governmental body or officer was detaining the applicant. E.g., *Felker v. Turpin*, 518 U.S. 651, 663 (1996); Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv. L. Rev.* 441, 465-74 (1963). Over the years, Congress has authorized a much broader use of habeas corpus; but it cannot be that curtailing an *optional* statutory enlargement violates the suspension clause. That would create an irrational ratchet. Habeas corpus could always be enlarged, but once enlarged could not be returned to its previous, less generous scope without a constitutional amendment. Once this was understood, there would be few if any further enlargements. There can be no doubt that the applicants for habeas corpus in the present cases are detained pursuant to valid orders issued by the responsible authorities. The issue they wish to press – the issue of whether they are entitled to ask for discretionary relief from these orders – does not raise

doubts about the jurisdiction of the Immigration and Naturalization Service over them.

We are suggesting not that the meaning of habeas corpus in the suspension clause was set in stone in 1787, an issue left open in *Felker v. Turpin, supra*, 518 U.S. at 664, but only that the meaning of the *constitutional* term does not move in lockstep with changes in the meaning of the *statutory* term. *Lindh v. Murphy*, 96 F.3d 856, 867-68 (7th Cir. 1996) (en banc), rev'd on other grounds, 117 S. Ct. 2059 (1997); see also *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). The Sixth Amendment guarantees the right to counsel; but if Congress passed a statute entitling every federal criminal defendant to have three lawyers, it would not mean that the Sixth Amendment entitled every federal criminal defendant to three lawyers.

These considerations make us doubt that concerns about the suspension clause played any role in the omission from section 440(a) of an explicit reference to 28 U.S.C. § 2241. On the contrary, we cannot think of any theory under which Congress would have wanted section 440(a) to limit only review in the courts of appeals and leave intact whatever powers the old section 106(a)(10) – which, remember, section 440(a) repealed – had conferred on the district courts. The purpose of the new section was not to restore the pre-1961 regime and slow down deportation by creating two layers of judicial review, rather than one as under the regime that prevailed for all deportees between 1961 and 1996. The purpose was to curtail and speed up judicial review of deportation orders directed against disfavored classes of criminals, such as drug offenders. If the effect of the new provision was, as our petitioners and the cases we have cited believe, to

shift judicial review to the district court, followed of course by appeal to this court, then Congress enlarged judicial review for these deportees (and for no others! – the others remain under the 1961 procedure, which confines them to the courts of appeals except where direct review by those courts is unavailable) by allowing them to challenge their deportation in two courts rather than one.

Against this the petitioners argue that judicial review by means of habeas corpus is narrower than the direct review in this court under the 1961-1996 regime, being limited to questions of law, so that, provided there is at least *some* evidence to support the order, the court will not disturb it. Under the former regime, the court (just the court of appeals, remember) reviewed for substantial evidence as well. *Dashto v. INS*, 59 F.3d 697, 703 (7th Cir. 1995) [sic] *Paredes-Urrestarazu v. U.S. INS*, 36 F.3d 801, 821 (9th Cir. 1994); *Gouveia v. INS*, 980 F.2d 814, 818 (1st Cir. 1992). This distinction was pointed out by the Supreme Court in *Heikkila v. Barber, supra*, 345 U.S. at 235-36, and has been repeated in subsequent cases. E.g., *Goncalves v. Reno, supra*, 144 F.3d at 124-25. But *Heikkila* was decided in 1953, at a time when habeas corpus was conceived much more narrowly than later on, leaving one to wonder just how much practical difference there would be between the two modes of review today. Habeas corpus is available under 28 U.S.C. § 2241 for anyone held in custody in violation of federal law, including section 212(c) of the Immigration and Nationality Act and its successor provision, and the alien who claims that the Board of Immigration Appeals abused its discretion in failing to grant him relief under that section might be

thought to be arguing that the BIA had violated the section. Cf. *Goncalves v. Reno, supra,* 144 F.3d at 125 n. 17. (Various statutes culminating in the Antiterrorism and Effective Death Penalty Act have curtailed the habeas corpus remedy for persons detained pursuant to a conviction, but an order of deportation is not a conviction.) If so, then Congress accomplished nothing toward its aim of curtailing judicial review if review on habeas corpus survived the door-closing impact of section 440(a). Maybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed by* review by the courts of appeals. If not – if judicial review would be significantly narrower under habeas corpus than under section 106 – we have the anomaly of two tiers of identical review, since in cases when all the district court considers is a question of law, our review is plenary.

We conclude that for the class of aliens encompassed by section 440(a), judicial review by means of habeas corpus did not survive the enactment of that section. It does not follow that judicial review of the class of deportation orders illustrated by the orders in these two cases has been totally extinguished. The government does not argue that. Mindful of the presumption that executive resolutions of constitutional issues are judicially reviewable, *Webster v. Doe,* 486 U.S. 592, 603 (1988); *Czerkies v. U.S. Dept. of Labor,* 73 F.3d 1435 (7th Cir. 1996) (en banc); *Marozsan v. United States,* 852 F.2d 1469 (7th Cir. 1988) (en banc), it urges us to read into section 440(a) an exception that will allow the review of such issues. This is the road we started down in *Yang v. INS, supra,* 109 F.3d at 1192, is the approach of the Third Circuit, *Morel v. INS,* 144 F.3d

248 (3d Cir. 1998), and now of the Eleventh, *Richardson v. Reno, supra,* 1998 WL 850045 at *28-29, has been acknowledged as a possible approach by the Tenth, *Fernandez v. INS,* 113 F.3d 1151, 1155 (10th Cir. 1997), and was favored by the Second Circuit in *Henderson v. INS, supra,* 157 F.3d at 119 n. 9, although that court felt constrained by Second Circuit precedent to eschew the approach in favor of preserving habeas corpus. If, as we believe in agreement with the government, the deportee can seek review of constitutional issues in the court of appeals directly, as under the prior regime governing judicial review of deportation, then the layering of judicial review proposed by the petitioners is avoided, judicial review is curtailed as Congress intended, but enough of a safety valve is left to enable judicial correction of bizarre miscarriages of justice. These are unlikely but, given the unpopularity of aliens in some quarters (which has led the Supreme Court to classify them as a particularly vulnerable group for purposes of judicial review of their equal protection claims, *Bernal v. Fainter,* 467 U.S. 216, 219 (1984)), not unthinkable. Suppose the Board of Immigration Appeals ordered an alien deported on the basis of a criminal conviction that it knew had been vacated, but it didn't care because the alien was black. We have expressed doubt that Congress intended to forbid such orders to be challenged in court under section 440(a). *Yang v. INS, supra,* 109 F.3d at 1192.

Morel and *Richardson,* in holding as do we today that direct review remains available under section 440(a) for aliens wishing to challenge their deportation on constitutional grounds, necessarily imply (and *Richardson* makes explicit) the rejection of habeas corpus in all cases in

which direct review is possible, as there is no question of Congress's power to prescribe a habeas corpus substitute. *Swain v. Pressley*, 430 U.S. 372, 381 (1976); *United States v. Hayman*, 342 U.S. 205 (1952); *Blair-Bey v. Quick*, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998); cf. *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997). By the same token, if for reasons beyond the alien's control he could not have raised his substantial constitutional issue in this court by seeking review here directly under section 440(a), he may be able to proceed in the district court under 28 U.S.C. § 2241. This we need not decide; such cases will be very rare, and these two cases are not among them. These petitioners brought their actions in the wrong court under the wrong statute. And it is now too late for them to file a petition for review in the right court, 8 U.S.C. § 1105a(a)(1) (1994); *Stone v. INS*, 514 U.S. 386, 406 (1995); *Torres v. INS*, 144 F.3d 472, 473 (7th Cir. 1998); *Hadera v. INS*, 136 F.3d 1338, 1341 (D.C. Cir. 1998), that is, in this court. But we shall add, lest they feel that we've tripped them up on a technicality, that they would not have prevailed even if they hadn't dropped the jurisdictional ball. The Board of Immigration Appeals was right that the abolition of waiver of deportation for the class of deportees that includes these two petitioners applies to pending cases, and so to the petitioners.

Several sections of the Antiterrorism and Effective Death Penalty Act that curtail the rights of aliens are expressly prospective, §§ 440(f), 421(b), 435(b), and two are expressly retroactive, §§ 401(f), 413(g), but section 440(d) is neither. This makes it impossible for us to determine as a matter of legislative intent whether that section

is to be applied prospectively or retroactively, *Chow v. INS, supra,* 113 F.3d at 665, and so we need a rule that determines decision when legislative meaning is opaque. The relevant rule is that statutes which change primary (out of court) duties, for example statutes that impose new tort liabilities, are applied prospectively, while statutes that change merely procedures are applied retroactively. *Lindh v. Murphy,* 117 S.Ct. 2059, 2062-63 (1997); *Landgraf v. USI Film Products,* 511 U.S. 244 (1994); *Chow v. INS, supra,* 113 F.3d at 665; *Reyes-Hernandez v. INS,* 89 F.3d 490, 492 (7th Cir. 1996); *United States v. Certain Funds,* 96 F.3d 20, 24 (2d Cir. 1996). The reasoning behind this distinction is that people are much more likely to rely on substantive than procedural law. But this implies that when it is the kind of procedural change that does disturb reasonable expectations, the presumption in favor of retroactive application is reversed. Suppose a person facing deportation conceded deportability in reliance on having a good shot at a waiver of deportability. In that event, to abolish such waiver for his class of deportees after he had relied by forgoing a challenge to deportability would pull the rug out from under him. And in that case we have held that the abolition would not apply to him, would be prospective only. *Reyes-Hernandez v. INS, supra,* 89 F.3d at 492-93; see also *Yang v. INS, supra,* 109 F.3d at 1191-92; *Arevalo-Lopez v. INS,* 104 F.3d 100 (7th Cir. 1997); *In re Soriano,* Interim Decision No. 3289, p. 8, 1996 WL 426888 (BIA Feb. 21, 1997); but see *Kolster v. INS,* 101 F.3d 785, 789 (1st Cir. 1996); *Hincapie-Nieto v. INS,* 92 F.3d 27, 30 (2d Cir. 1996). There is no suggestion of such "mouse trapping" here. It would border on the absurd to argue that these aliens might have decided not to commit

drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.

We may seem to have assumed that if the petitioners had filed a timely petition for review in this court, we could have decided the issue. The government argues that we could not have, since the issue is not constitutional. This would make the decision of the Board of Immigration Appeals regarding the domain of section 440(d) judicially unreviewable. It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect. So maybe the door to judicial review has been left a little more ajar than we have suggested. *Yang v. INS, supra,* 109 F.3d at 1195-96; *Richardson v. Reno, supra,* 1998 WL 850045 at *28-29. But that is another question that we need not answer today.

We add, finally, that there is no merit to Avelar-Cruz's equal protection challenge. A rational and indeed sensible reason can readily be assigned to Congress's more lenient treatment of excludable as distinct from deportable aliens: it creates an incentive for deportable aliens to leave the country – which is after all the goal of deportation – without their having to be ordered to leave at the government's expense. To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country and by doing so trigger exclusion proceedings.

This equal protection issue must not be confused with that in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), where the government was taking the irrational position that an alien who after coming to the United States had taken a trip abroad and returned and was then ordered deported was entitled to more consideration than one who had never taken a foreign trip after coming to the United States. That is different from the situation of an alien who seeks discretionary relief while he is still outside the United States.

The essential point, however, is that the petitioners initiated their actions in the wrong court. The judgment in LaGuerre's case is modified to base dismissal on want of jurisdiction, and the judgment in Avelar-Cruz's case is reversed with instructions to dismiss the action, also for want of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOSE MARTIN AVELAR CRUZ, Petitioner, v. JANET RENO, as Attorney General of the United States; DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service; BRIAN PERRYMAN, as Chicago District Director of the Immigration and Naturalization Service; and the IMMIGRATION AND NATURALIZATION SERVICE, Defendants.	No. 98 C 1193 Suzanne B. Conlon, Judge

MEMORANDUM OPINION AND ORDER

Jose Martin Avelar-Cruz ("Avelar-Cruz") petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2241, Art. I, § 9, cl. 2 of the Constitution, and 28 U.S.C. § 1331. He seeks review of a final order of deportation. Avelar-Cruz names Janet Reno, Attorney General of the United States; Doris Meissner, Commissioner of the Immigration and Naturalization Service ("the INS"); Brian Perryman,

Chicago District Director of the INS; and the INS, as respondents.

BACKGROUND

Avelar-Cruz is a twenty-five year old citizen of Mexico who entered the United States in 1975 without inspection. Avelar-Cruz became a temporary resident under the amnesty provisions of 8 U.S.C. § 1255a on September 25, 1987. On May 10, 1989, Avelar-Cruz became a lawful permanent resident alien.

On September 7, 1993, Avelar-Cruz was convicted of possession with intent to deliver and delivery of a controlled substance (each offense involving less than one gram of cocaine). He was sentenced to consecutive terms of three and four years in state prison. The INS subsequently issued an order to show cause alleging that Avelar-Cruz was deportable pursuant to 8 U.S.C. § 1251(a)(2)(A)(iii), as an alien convicted of an aggravated felony, and 8 U.S.C. § 1251(a)(2)(B)(i) as an alien convicted of a controlled substance violation.

In a deportation hearing before an immigration judge, Avelar-Cruz contested his deportability. The INS introduced certified copies of Avelar-Cruz' narcotics convictions. On June 20, 1994, the immigration judge found Avelar-Cruz deportable on both charges contained in the order to show cause. The immigration judge found Avelar-Cruz statutorily ineligible for a waiver under 8 U.S.C. § 1182(c) because Avelar-Cruz had not accumulated seven

years of domicile in the United States following his lawful admission.[1] Consequently, Avelar-Cruz was ordered deported to Mexico. On November 14, 1994, the Board of Immigration Appeals ("BIA") affirmed this decision.

Avelar-Cruz challenged this decision in the United States Court of Appeals for the Seventh Circuit. On June 27, 1995, the Seventh Circuit held that for purposes of a waiver under 8 U.S.C. § 1182(c), Avelar-Cruz' lawful domicile in the United States began on September 25, 1987 when he became a temporary resident. Therefore, the court granted Avelar-Cruz' petition for review and remanded the case to the BIA. *See Avelar-Cruz v. INS*, 58 F.3d 338, 341 (7th Cir. 1995). On February 7, 1996, the BIA remanded the proceedings to the immigration judge to adjudicate Avelar-Cruz' application for a waiver.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of the AEDPA amended 8 U.S.C. § 1182(c) in part by making aliens who are "deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D)" ineligible for a waiver.

---

[1] Prior to enactment of the AEDPA, criminal aliens could seek a discretionary waiver of deportation under section 212(c) of the INA. Section 212(c) stated in relevant part:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . .

8 U.S.C. § 1182(c).

On November 18, 1996, the immigration judge held that because of Avelar-Cruz' prior narcotics convictions, he was statutorily ineligible for a waiver under 8 U.S.C. § 1182(c) (as amended by AEDPA § 440(d)). The immigration judge ordered Avelar-Cruz deported to Mexico. On January 8, 1998, the BIA dismissed Avelar-Cruz' appeal, relying on the Attorney General's decision in *Matter of Soriano*, Interim Decision No. 3289, 1996 WL 426888 (BIA 1996; A.G. 1997). Based on this final order of deportation, the INS ordered Avelar-Cruz to report for deportation on February 26, 1998. On February 25, 1998, Avelar-Cruz filed this petition for writ of habeas corpus.

Avelar-Cruz is presently in the custody of the Immigration and Naturalization Service; he contends the immigration judge's retroactive application of § 440(d) of the AEDPA during his deportation hearing denied him due process and denied him his statutory right to apply for a waiver of deportation under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq. Avelar-Cruz also contends he has been denied equal protection as a result of the decision in *Matter of Fuentes-Campos*, Int. Dec. No. 3318, 1997 WL 269368 (BIA 1997) (§ 440(d) applies to deportation proceedings but not exclusion proceedings).

DISCUSSION

With the exception of the equal protection claim, this court recently addressed all the issues raised by Avelar-Cruz' petition in a similar case. *See Laguerre v. Reno*, 1998

WL 100238 (N.D. Ill. Feb. 17, 1998). Where the issues overlap, the court finds no reason to depart from its opinion in *Laguerre*.

I. JURISDICTION

The court must first address whether the jurisdictional restrictions enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), P.L. 104-208, Div. C, 110 Stat. 3009 (1996), deprive it of subject matter jurisdiction over Avelar-Cruz' petition for writ of habeas corpus. Avelar-Cruz alleges jurisdiction under 28 U.S.C. § 2241, Art. I, § 9, cl. 2 of the Constitution, and 28 U.S.C. § 1331. Respondents contend that section § [sic] 242(g) of the INA, 8 U.S.C. § 1252(g), as amended by § 306(a) of IIRIRA, requires dismissal of the petition for lack of subject matter jurisdiction. Avelar-Cruz asserts, in essence, that despite IIRIRA's significance for judicial review of final orders of deportation, the court retains jurisdiction to consider the merits of habeas petitions pursuant to § 2241 because Congress did not affirmatively repeal habeas review under that statute. Alternatively, Avelar-Cruz invokes jurisdiction under the Suspension Clause of Article 1, section 9, clause 2 of the Constitution.

A. LEGISLATIVE BACKGROUND

The jurisdictional provisions of the INA have undergone a rapid succession of legislative amendments, all aimed at curtailment of federal court jurisdiction over INS administrative decisions and adjudications. In particular, Congress has taken steps apparently intended to

limit federal court jurisdiction over petitions for habeas corpus involving INS matters. First, Congress enacted the AEDPA on April 24, 1996. Section 404(e) of the AEDPA eliminated the INA provision governing habeas corpus review of deportation proceedings. Formerly, INA § 106(a)(10) provided: "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105(a)(10) (1994). Section 404(a) of the AEDPA replaced § 106(a)(10) with the following provision: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), (D) [of the INA] . . . shall not be subject to review by any court." 110 Stat. 1214, 1276-77.

Second, on September 30, 1996, Congress enacted IIRIRA. Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996). IIRIRA repealed § 106 of the INA and replaced it with a new § 242 entitled "Judicial Review of Orders of Removal." IIRIRA § 306, codified at 8 U.S.C. § 1252.[2] Specifically, IIRIRA § 306(a)(2)(C) replaced AEDPA § 404(a). The new provision reads: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense . . . . " INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

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[2] IIRIRA replaces the familiar term "deportation" with the term "removal."

B. APPLICABLE JURISDICTIONAL PROVISION

Instead of relying on IIRIRA § 306(a)(2)(C), respondents premise their subject matter jurisdiction argument on the effect of IIRIRA's broad jurisdictional provision found in § 306(a). Section 306(a) creates a new section 242(g) of the INA, entitled "Exclusive Jurisdiction." 8 U.S.C. § 1252(g). The new section provides:

> Except as provided in this section and notwithstanding any other provisions of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g). Avelar-Cruz does not directly challenge respondents' argument that the language of this section encompasses his claims. Rather, Avelar-Cruz raises the issue whether his petition is governed by § 242(g), as opposed to IIRIRA's transitional rules, which the statute makes applicable to persons in deportation proceedings commenced before April 1, 1997. *See* IIRIRA § 309.

Avelar-Cruz' argument raises a question of statutory construction: whether IIRIRA § 242(g) or IIRIRA's transition provisions, specifically § 309(c)(4)(G), govern the court's subject matter jurisdiction over the petition. A resolution of this question depends on both the relative effective dates of IIRIRA's statutory provisions and on their substantive scope. In general, the effective date of IIRIRA's amendments is "the first day of the first month beginning more than 180 days after the date of enactment

[September 30, 1996]" or April 1, 1997. § 309(a). Yet, § 309(c) creates transitional rules delaying implementation of its amendments for aliens in exclusion or deportation proceedings before April 1, 1997. In addition, § 309(a) excepts §§ 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) from the general effective date. The effective date for § 242(g) is found in § 306(c)(1). The section, as amended by technical corrections on October 11, 1996, Pub. L. 104-302, 110 Stat. 3656, 3657, provides:

> (c) EFFECTIVE DATE
>
> (1) IN GENERAL – Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection(a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

IIRIRA § 306(c)(1). Although manifesting a clear intent that the provision be applied retroactively, Congress failed to provide a date for § 242(g). Thus, the question arises whether § 242(g) was meant to take effect on the date of IIRIRA's enactment, as opposed to April 1, 1997.

The Seventh Circuit resolved this issue in *Lalani v. Perryman*, 105 F.3d 334 (7th Cir. 1997) (*per curiam*). In *Lalani*, the government argued that § 242(g) took effect on the date of enactment and thus deprived the court of jurisdiction. The Seventh Circuit rejected this construction of the statute. The court recognized that to interpret the statute in this manner would render meaningless "the provisions of the IIRIRA [the transition rules] deferring

application of its procedures for six months . . . because [the court] would have no jurisdiction in all cases immediately." *Id.* at 336. Noting that § 306(c) refers back to § 309, the Seventh Circuit held that § 242(g) would not take effect until April 1, 1997 – the general effective date. Finally, unlike the other subsections, § 242(g) applies retroactively to past and pending deportation proceedings.

IIRIRA's transition provisions delay the implementation of IIRIRA's amendments governing judicial review, including § 306(a)(2)(C). *See Turkhan v. INS*, 123 F.3d 487, 489 (7th Cir. 1997) ("Section 309 of the II[RI]RA . . . makes these new judicial review provisions inapplicable to aliens who are in deportation proceedings [before] April 1, 1997"); *see also Yang v. INS*, 109 F.3d 1185, 1191 (7th Cir. 1997) ("the II[RI]RA covers removal proceedings begun during or after . . . April"). The transition provisions state, in relevant part:

> (c) TRANSITION FOR ALIENS IN PROCEEDINGS –
>
> > (1) GENERAL RULE THAT NEW RULES DO NOT APPLY – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before [April 1, 1997] –
> >
> > > (A) the amendments made by this subtitle shall not apply, and
> > >
> > > (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.
> >
> > . . . .

> (4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW – In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act [after October 30, 1996] notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –
>
> . . . .
>
> (G) there shall be no appeal in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect on the date of enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

IIRIRA § 309(c). Provided Avelar-Cruz satisfies the criteria set forth above, he may benefit from the delayed implementation of the IIRIRA's more restrictive judicial review provisions.

Avelar-Cruz meets the statutory timing requirements for application of the transitional rules governing judicial review. First, his deportation proceedings commenced before April 1, 1997. Second, the deportation order became final after October 30, 1996. On remand from the

Seventh Circuit, the BIA ultimately dismissed Avelar-Cruz' appeal on January 8, 1998. On similar facts, courts have determined that § 309(c)(4)(G) is applicable. *See, e.g., Turkhan*, 123 F.3d at 488-89 (BIA denied motion to reopen on May 9, 1997); *Sandoval v. Reno*, Civ. No. 97-7289, 1997 U.S. Dist. Lexis 20976, *12-15 (E.D. Pa. Dec. 30, 1997) (BIA dismissed appeal on July 16, 1997). Finally, because the transition rules only supersede contrary provisions of the pre-IIRIRA law, § 440(a) of the AEDPA (INA § 106(a)(10)) would also apply. *See Turkhan*, 123 F.3d at 489.

Respondents urge that application of § 242(g) is required and it precludes habeas review of Avelar-Cruz' petition. The difficulty with this argument is that if § 242(g) operated to divest the district court of jurisdiction over Avelar-Cruz' habeas petition, it would render superfluous IIRIRA's specific provision governing jurisdiction for review of criminal alien deportations. *See* § 306(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C). In addition, retroactive application of § 242(g) would thwart application of the related transition provision for aliens in deportation proceedings. *See* § 309(c)(4)(G). Two familiar maxims of statutory construction support application of the specific IIRIRA provision. First, the specific takes precedence over the general. *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993). Second, a court is to give effect to all statutory provisions whenever possible. *See In re Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995); *see also United States v. Wagner*, 29 F.3d 264, 266 (7th Cir. 1994).

IIRIRA § 306(a)(2)(C) is entitled "Orders Against Criminal Aliens" and is located in a subsection of INA

§ 242 entitled "Matters Not Subject to Judicial Review." The language of this subsection mirrors the language of § 242(g). For instance, both provisions contain the core phrase "notwithstanding any other provision of law, no court shall have jurisdiction." Just as § 242(g) seems gauged to divest federal courts of jurisdiction over all judicial review of administrative decisions or actions of the attorney general, including habeas corpus petitions, § 306(a)(2)(C) seems to divest federal courts of all judicial review of criminal alien deportations under enumerated sections. If the scope of § 242(g) is as broad as respondents claim, its application would render § 306(a)(2)(C) meaningless. Thus, in order to give full effect to the precise language of § 306(a)(2)(C), and the related transition provision, § 309(c)(4)(G), the court finds Avelar-Cruz' claims beyond the scope [sic] § 242(g). Avelar-Cruz' petition seeks habeas review of a final order of deportation based on his criminal alien status pursuant to INA §§ 241(a)(2)(A)(iii) and 241(a)(2)(B)(i). His petition is only incidentally directed at a "decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." § 242(g). Accordingly, the broad terms of § 242(g) do not govern this case.

C. JURISDICTION PURSUANT TO § 2241

The next inquiry is whether the court retains subject matter jurisdiction over Avelar-Cruz' petition pursuant to 28 U.S.C. § 2241, despite the jurisdiction narrowing language of both § 440(a) and its IIRIRA counterpart, § 309(c)(4)(G). No federal appellate court has yet directly reached this issue. A number of appellate courts have addressed the constitutionality of § 440(a)'s restrictions

on appellate review. In concluding that Congress could constitutionally divest the appellate courts of jurisdiction over direct appeals from final deportation orders, a number of courts have assumed the continuing availability of federal habeas relief. *See, e.g., Chow v. INS*, 113 F.3d 659, 669 (7th Cir. 1997) ("Thus, we cannot say that section 106(a) of the INA is *Chow*'s only avenue of judicial review, and because other avenues for relief remain open, we hold that section 440(a) does not violate *Chow*'s due process rights"); *Kolster v. INS*, 101 F.3d 785, 790-91 (1st Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27, 30-31 (2d Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996). Further, a growing majority of district courts across the nation, including this court, have already concluded that federal habeas relief remains available under § 2241. *Gutierrez-Martinez*, ___ F. Supp. ___, 1998 WL 7459 (N.D. Ga. Jan. 8, 1998); *Morisath v. Smith*, No. C 97-12392, 1997 WL 797664 (W.D. Wash. Dec. 23, 1997); *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997); *Ozoanya v. Reno*, 968 F. Supp. 1 (D.D.C. 1997); *Vargas v. Reno*, 966 F. Supp. 1537 (S.D. Cal. 1997); *Yesil v. Reno*, 958 F. Supp. 828 (S.D.N.Y. 1997), *reconsid. den.*, 973 F. Supp. 372 (S.D.N.Y. 1997); *Dunkley v. Perryman*, No. 96 C 3570, 1996 WL 464191 (N.D. Ill. Aug. 7, 1996); *Mbiya v. INS*, 930 F. Supp. 609 (N.D. Ga. 1996); *Powell v. Jennifer*, 937 F. Supp. 1245 (E.D. Mich. 1996). Finally, in *Sandoval*, the district court reached the identical conclusion with respect to IIRIRA § 309(c)(4)(G). 1997 U.S. Dist. Lexis 20976.

The conclusion that habeas jurisdiction persists under § 2241 is mandated, in large part, by the Supreme Court's recent opinion in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996). In *Felker*, the Supreme Court addressed

the effects of AEDPA's gatekeeping mechanism on the Court's original jurisdiction over habeas petitions. The challenged AEDPA provisions were designed to restrict the filing of successive habeas petitions. The Supreme Court premised its analysis of the AEDPA provision on the presumption against repeal of habeas corpus jurisdiction by implication. *Ex parte Yerger*, 8 Wall. 85, 19 L.Ed. 332 (1869). Finding no affirmative mention of the Court's authority to hear habeas petitions in Title I of the AEDPA or in the specific section restricting the Supreme Court's appellate jurisdiction, the Court declined to find a repeal of its jurisdiction over original petitions pursuant to § 2241 or § 2254.

Felker's presumption against repeal by implication compels the conclusion that the general language of § 440(a) does not eliminate subject matter jurisdiction over habeas corpus petitions pursuant to § 2241. *See, e.g., Yesil*, 958 F. Supp. at 838 ("Sections 401 and 440 of the AEDPA do not state that they repeal or amend section 2241; indeed, they do not mention section 2241 at all"); *Mojica*, 970 F. Supp. at 160 ("The AEDPA does not amend, or even mention, section 2241 of Title 28"). *Felker* applies with even greater force in the context of § 309(c)(4)(G) because Congress substituted the narrower term "appeal" for § 440(a)'s "review." *See Sandoval*, 1997 U.S. Dist. Lexis at 22-23; *see also Mojica*, 970 F. Supp. at 160. Accordingly, neither § 440(a), nor § 309(c)(4)(G), operates to preclude this court's exercise of jurisdiction over Avelar-Cruz' petition pursuant to § 2241.

Finally, the court must determine whether Avelar-Cruz meets the jurisdictional requirement of § 2241. First, Avelar-Cruz must be "in custody under or by color of the

authority of the United States." 28 U.S.C. § 2241(c)(1). It is undisputed Avelar-Cruz is presently in INS custody. Second, Avelar-Cruz' petition alleges he is "in custody in violation of the Constitution [and] laws . . . of the United States." § 2241(c)(3). Accordingly, Avelar-Cruz has met the "in custody" jurisdictional requirement of 28 U.S.C. § 2241.

II. RETROACTIVE APPLICATION OF § 440(d)

A. PRESUMPTION AGAINST RETROACTIVITY AND DUE PROCESS

Prior to the passage of the AEDPA, Avelar-Cruz was eligible to apply for a waiver of deportation pursuant to § 212(c) of the INA. 8 U.S.C. 1182(c) (1994). Section 212(c) authorized the Attorney General to grant waivers of deportation to residents lawfully domiciled in the United States for at least seven years. In other words, the Attorney General could exercise her discretion to allow permanent residents, like Avelar-Cruz, to remain in the United States even after commission of a deportable offense. The enactment of § 440(d) of the AEDPA significantly reduced the Attorney General's discretion to grant applications for waiver of deportation. Specifically, the amendment rendered ineligible any alien who had committed: an aggravated felony; a controlled substance offense; certain firearm offenses; convictions of two crimes of moral turpitude; or other miscellaneous crimes. AEDPA § 440(d), 110 Stat. 1214, 1277 (amending INA § 212(c), 8 U.S.C. § 1182(c)).

Avelar-Cruz' convictions placed him in the aggravated felon and controlled substance offense categories of § 440(d). Relying on Avelar-Cruz' ineligibility for discretionary relief under AEDPA § 440(d), the immigration judge denied his application for a waiver of deportation pursuant to former INA § 212(c). The BIA affirmed on this basis. Avelar-Cruz argues that the application of § 440(d) to his case is impermissibly retroactive and violates the due process clause. Section 440(d) can be viewed as retroactive as applied to Avelar-Cruz in two respects. First, § 440(d) could be retroactive as applied to a pending application for relief. As discussed above, Avelar-Cruz had a waiver application pending on the date of the AEDPA's enactment. Second, § 440(d) could be retroactive as applied to criminal convictions that predate the enactment of the AEDPA.[3] Avelar-Cruz' criminal convictions predate the enactment of the AEDPA.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the Supreme Court reaffirmed the time-honored presumption against statutory retroactivity. In determining whether a statute applies retroactively, the core inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 269-70. *Landgraf* established a two-part test to guide a court's retroactivity analysis. First, the court must "determine whether Congress has expressly

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[3] The Seventh Circuit expressly left this issue open in *Reyes-Hernandez*, where the court stated it need not address the applicability of sections 440(a) and (d) where deportability was determined in a contested proceeding or where the criminal convictions or criminal acts occurred before the AEDPA was passed. 89 F.3d at 493.

prescribed the statute's proper reach." *Id.* at 1505. The "requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. Provided Congress has included an express command specifying the statute's temporal reach, there is no need to further advance the inquiry. If, however, Congress failed to specify the statute's temporal reach, the court must consider "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*

In the course of its survey of the jurisprudential history of the presumption against retroactivity, the Supreme Court identified a number of situations where application of new statutes to antecedent events is "unquestionably proper," even in the absence of a clear Congressional command. 511 U.S. at 273. The first illustration offered was statutes that authorize or affect the propriety of prospective relief, such as statutes altering the conditions for injunctive relief. Statutes creating or repealing jurisdiction were another notable example. The Court stated "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. Changes in procedural rules were another apt illustration. Because of the "diminished reliance interests in matters of procedure," these rules "may often be applied in suits arising before

their enactment without raising concerns about retroactivity." *Id.* at 275. In sum, a statute does not have retroactive effect "merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Id.* at 269-70.

As an initial matter, Congress did not specify the temporal reach of § 440(d). The AEDPA contains no effective date provision governing § 440(d). The section is therefore deemed effective on the date of enactment. Consequently, this court must address the second part of the *Landgraf* analysis: whether § 440(d) violates the presumption against retroactivity. Respondents argue that § 440(d) may be constitutionally applied to prior convictions because its amendment to § 212(c) is analogous to a jurisdictional statute or to one affecting the propriety of prospective relief. According to this interpretation, § 440(d) operates only prospectively, as a limitation on the Attorney General's authority to grant discretionary relief to a specified class of candidates for automatic deportation. Respondents find general support in *Landgraf* for this argument. Avelar-Cruz characterizes the effect of § 440(d) as retroactive. In Avelar-Cruz' view, the amendment to § 212(c) stripped him of a substantive cause of action – the right to apply for discretionary relief from deportation. Avelar-Cruz relies on the Supreme Court's recent decisions in *Hughes Aircraft Co. v. United States ex rel. Schumer*, ___ U.S. ___, 117 S. Ct. 1871 (1997) and *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059 (1997).

Respondents' interpretation of § 440(d)'s effect finds overwhelming support in the plain language of the statute and in relevant precedent. The full text of INA § 212(c), as amended by § 440(d), reads:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under § 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

8 U.S.C. § 1182(c). The provision plainly defines the contours of the Attorney General's discretion to grant discretionary relief. In other words, § 440(d) makes aliens convicted of enumerated crimes ineligible for relief by limiting the Attorney General's discretion. Nothing in the express language of the provision lends itself to the argument that an application for a waiver is akin to a substantive cause of action. Indeed, unlike the statutory provisions at issue in *Hughes*, § 440(d) does not impair any rights Avelar-Cruz had when he committed the drug offenses for which he was convicted.[4] While at that time

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[4] Both *Hughes* and *Lindh* are ultimately inapposite because they involved statutory provisions that added new legal consequences to a substantive cause of action. *Hughes* involved

Avelar-Cruz could have applied for relief from automatic deportation, he could not have claimed a settled expectation in the ultimate granting of discretionary relief. In sum, § 440(d) simply scaled back the Attorney General's prospective discretion to grant a particular form of relief.

This conclusion is bolstered by relevant authority. In *Matter of Soriano*, Int. Dec. 3289 (A.G. Slip. Op. Feb. 21, 1997), the Attorney General addressed whether § 440(d) is retroactive as applied to pending cases. The Attorney General opined that § 440(d) applied to pending cases because it "does not impair a right, increase a liability, or impose new duties on criminal aliens." *Id.* at 4. In arriving at that conclusion, the Attorney General reasoned the relief sought in waiver applications is prospective in nature. She found support for this view in the Supreme Court's statement in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), that: "The deportation hearing looks prospectively to the respondent's rights to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." *Id.* at 5. Furthermore, she compared § 440(d) to a jurisdictional statute because it "speaks to the power of the

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an amendment that expanded the scope of *qui tam* actions under the False Claims Act. The Court stated: "In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action. . . . " 117 S. Ct. at 1878. *Lindh* involved another section of the AEDPA, the section governing the standards applicable to habeas corpus petitions, 28 U.S.C. § 2254(d). The Supreme Court noted that "the statue [sic] goes beyond 'mere' procedure to affect substantive entitlement to relief." 117 S. Ct. at 2063.

Attorney General to waive deportation," just as jurisdictional statutes speak to the power of the court. *Id.* Thus, she concluded § 440(d) would not be retroactive as applied to pending cases.[5]

The federal appellate courts' analysis of the retroactivity of past Congressional amendments to § 212(c) is also instructive. Indeed, the AEDPA is not the first time Congress has rendered a class of felons ineligible for § 212(c) relief. The Immigration Act of 1990 rendered aggravated felons who served at least five years in prison ineligible to apply for a waiver. § 511(a), Pub. L. No. 101-649, 104 Stat. 4978, 5052 (1990). Aliens challenged the retroactivity of this provision as applied to convictions predating the enactment of the statute. The appellate courts uniformly rejected the contention that its application violated the presumption against retroactivity. *See, e.g., Scheidemann v. INS*, 83 F.3d 1517 (3d Cir. 1996); *Campos v. INS*, 16 F.3d 118 (6th Cir. 1994); *Barreiro v. INS*, 989 F.2d 62 (1st Cir. 1993); *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993); *Osorio v. Fox*, 10 F.3d 1034 (4th Cir. 1993). In describing the nature of the interest effected by the statute, the courts rejected any claim of a reliance interest in the opportunity to apply for a waiver of deportation. *Kolster v. INS*, 101 F.3d 785, 789 (1st Cir. 1996)

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[5] In keeping with the Seventh Circuit's decision in *Reyes-Hernandez*, the Attorney General did carve out a narrow exception to the rule that § 440(d) applies in pending cases to allow aliens who conceded deportability prior to the enactment of the AEDPA, and who had a colorable defense to deportability, to reopen their cases. A.G. Slip. Op. at 8.

(citing cases). In particular, the Third Circuit in *Scheidemann* made the following decisive summary of the nature of discretionary relief under § 212(c):

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a judicial body, these changes speak only to the power of a public agency. Finally, like legislation altering procedural rights, the relevant amendments in this case regulate secondary rather than primary conduct and infringe on no significant reliance interest. Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

83 F.3d at 1523. Although the preclusive scope of § 440(d) is much broader than the scope of the 1990 amendment to § 212(c), the nature of discretionary relief remains the

same. In both instances, "the availability of purely discretionary relief does not create substantive rights in otherwise deportable aliens." *Kolster*, 101 F.3d at 789.

Another relevant line of authority was recently discussed by the Seventh Circuit in *Chow v. INS*, 113 F.3d 659 (1997). In *Chow*, the Seventh Circuit faced the issue whether § 440(a)'s preclusion of appellate review violated the presumption against retroactivity as to pending cases and as to pre-AEDPA criminal conduct. In reaching the conclusion that § 440(a)'s withdrawal of judicial review did not "attach new legal consequences to the alien's [prior criminal] conduct," the court reasoned:

> Courts routinely hold that the INS may lawfully deport an alien under a statute which makes certain conduct a ground for deportation even if the alien engaged in the conduct before the statute went into effect. *Marcello v. Bonds*, 349 U.S. 302, 314, 75 S. Ct. 757, 764, 99 L.Ed. 1107 (1955) (allowing deportation based on conviction that was not a ground for deportation at the time the alien was convicted); *Hamama v. INS*, 78 F.3d 233, 235-36 (6th Cir. 1996) (same); *Ignacio v. INS*, 955 F.2d 295, 298 (5th Cir. 1992) (same); *United States v. Bodre*, 948 F.2d 28, 32-33 (1st Cir. 1991) (same). Accordingly, making deportation a consequence of certain criminal acts does not attach new liabilities or penalties to those acts.

113 F.3d at 667. The present case presents an even stronger claim for a finding of no retroactive effect than did the cases cited in *Chow*. This is because § 440(d) does not go so far as to alter the primary grounds for deportation. Aliens in Avelar-Cruz' particular situation are subject to deportation for the same set of criminal offenses. In sum,

"§ 440(d) merely removes one potential means of avoiding deportation" for those offenses. *Guitierrez-Martinez*, 1998 WL at *5; *Vargas*, 96[illegible] Supp. at 1544.

Two courts have found § 440(d) impermissibly retroactive as applied to criminal conduct predating the enactment of the AEDPA. Both courts have evinced great concern that the provision upsets settled expectations which form the basis for guilty pleas entered by criminal aliens. *See, e.g., Sandoval*, 1997 U.S. Dist. Lexis at *35; *Mojica*, 970 F. Supp. at 176 – 78. While it is undeniable that immigration consequences may be a factor in a decision to plead guilty, this court is not convinced by *Sandoval* or *Mojica* that the availability of discretionary relief under § 212(c) is the sole or even a significant motivating factor in decisions to enter guilty pleas. It is a stretch to assume a criminal defendant would forgo a viable defense in order to enter a guilty plea to a crime that makes him subject to automatic deportation, simply for the opportunity to apply for discretionary relief. Nevertheless, one can imagine a scenario where § 440(d) would seem to frustrate the expectations of criminal aliens. *See Mojica*, 970 F. Supp. at 176. The presumption against retroactivity, however, affords no guarantee against upset expectations based in prior law. *Landgraf*, 511 U.S. at 1499. Rather, the question is whether § 440(d) attaches new legal consequences to Avelar-Cruz' criminal convictions. For the reasons stated above, this court answers that question in the negative.

Avelar-Cruz acknowledges Congress had a legitimate basis for making discretionary waiver unavailable for aliens who commit certain crimes. Avelar-Cruz argues

retroactive application of this policy to reach crimes committed before the AEDPA was enacted "violate[s] substantive due process norms." He conclusorily asserts Congress had no legitimate basis for denying aliens like him the opportunity to apply for a discretionary waiver. But Avelar-Cruz fails to demonstrate Congress acted irrationally when it sought to prevent *all* aliens convicted of aggravated felonies or controlled substance violations from obtaining waivers from orders of deportation.

B. EQUAL PROTECTION

Section 440(d) of the AEDPA states the discretionary waiver "shall not apply to an alien who is *deportable* by reason of having committed [enumerated offenses]." (emphasis added). The Board of Immigration Appeals interprets the underlined language to mean that legal permanent resident aliens ("LPR aliens") in *deportation* proceedings are disqualified from applying for a waiver, while LPR aliens in *exclusion* proceedings based on the same offense may apply for a waiver. *See Matter of Fuentes-Campos*, Int. Dec. No. 3318, 1997 WL 269368 (BIA May 14, 1997). Avelar-Cruz argues the distinction drawn by *Fuentes-Campos* is not rationally related to a legitimate governmental interest and therefore violates the equal protection clause. To address Avelar-Cruz' claim, it is necessary to set out some basic principles and briefly trace the development of the law in this area.

Deportable aliens reside in the United States, but are subject to deportation. 8 U.S.C. § 1251(a). Excludable aliens may be denied *entrance* into the United States. 8

U.S.C. § 1182(a). In § 212(c) of the INA, Congress provided that excludable aliens who were legal permanent residents of the United States for seven years and who traveled abroad voluntarily and temporarily could be readmitted at the discretion of the Attorney General. 8 U.S.C. § 1182(c). By its terms, the "waiver of exclusion" discretion given the Attorney General by § 212(c) applied only to excludable aliens seeking readmission to the United States. But in 1956, the BIA held that LPR aliens in deportation proceedings *who had previously traveled abroad* could apply for a waiver under § 212(c). The BIA reasoned that since those LPR aliens would have been eligible for discretionary relief at the time of readmission, discretionary relief could also be granted at a later juncture. *See Matter of G.A.*, 7 I. & N. Dec. 274 (BIA 1956). The BIA subsequently declined to extend § 212(c) discretionary relief to otherwise eligible LPR aliens who had *not* departed the country after being convicted. *See Matter of Arias-Uribe*, 13 I. & N. Dec. 696 (BIA 1971).

The discrepancy did not go unnoticed. In 1976, the Second Circuit held that in order to satisfy equal protection requirements, § 212(c) discretionary relief had to be available in *deportation* proceedings for LPR aliens who met the seven year requirement, *whether or not they traveled abroad after their convictions. Francis v. INS*, 532 F.2d 268 (2d Cir. 1976). The court found that extending § 212(c) relief to deportees who had left the country after committing a deportable offense, but not to deportees who had remained, was irrational and therefore violated the equal protection component of the Fifth Amendment Due Process Clause. "[A]n alien whose ties with this country are so strong that he has never departed . . . should receive

at least as much consideration as an individual who may leave." *Id.* at 273; *see also Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

The rule in *Francis* was universally accepted by federal appellate courts, including the Seventh Circuit. *See, e.g., Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993). The INS adopted *Francis* nationwide so that all eligible LPR aliens who were ordered deported could ask the Attorney General to waive the ground for deportability under § 212(c). *See Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). Congress never explicitly amended the INA to make § 212(c) applicable to LPR aliens in deportation proceedings. Rather, § 212(c) was judicially extended in order to comply with equal protection principles.

Effective April 24, 1996, § 440(d) of the AEDPA amended § 212(c) and expressly eliminated discretionary relief for LPR aliens who were convicted of certain crimes, including the crimes committed by Avelar-Cruz. As previously indicated, the amendment itself used the word "deportable." As a result, the BIA interpreted § 440(d) to apply only to deportable aliens and not to *excludable* aliens. Accordingly, the BIA ruled § 212(c) discretionary relief remained available for LPR aliens in exclusion proceedings. *See Matter of Fuentes-Campos*, Int. Dec. No. 3318, 1997 WL 269368 (BIA May 14, 1997).

Section 212(c) as amended by AEDPA § 440(d) was repealed by IIRIRA § 304(b). IIRIRA § 304(a)(7) consolidated deportation and exclusion proceedings into a single category of "removal" proceedings, eliminating the distinction Avelar-Cruz challenges in this case. However,

IIRIRA does not apply to deportation proceedings pending as of April 1, 1997. *See* IIRIRA § 309(c)(1). Avelar-Cruz' deportation proceedings were pending as of April 1, 1997. Accordingly, IIRIRA cannot cure any harm suffered by Avelar-Cruz.

Avelar-Cruz argues the distinction drawn by *Fuentes-Campos* is not rationally related to a legitimate governmental interest and therefore violates the equal protection clause. Avelar-Cruz concedes that the equal protection analysis must proceed under the minimal "rational basis" test, but argues that under *Francis* no rational basis exists for treating LPR aliens who temporarily leave the country differently from otherwise similarly situated aliens who do not leave the country. Avelar-Cruz points out two courts have already found that denial of an LPR alien's application for waiver based on § 440(d) violates the equal protection clause where the application was denied in deportation proceedings (1) pending as of April 1, 1997 (*i.e.*, not governed by IIRIRA's repeal of § 440(d)) and (2) decided by the BIA after the May 14, 1997 *Fuentes-Campos* decision. *See Jurado-Gutierrez v. Greene*, 977 F. Supp. 1089 (D. Colo. 1997); *Vargas v. Reno*, 966 F. Supp. 1537 (S.D. Cal. 1997).

Respondents argue *Francis* is distinguishable because it found an equal protection violation based on the disparate treatment of two groups of *deportable* LPR aliens – those who had traveled abroad and returned after their convictions, and those who had never left the country. Respondents emphasize that both groups were in *deportation* proceedings. Adopting the reasoning of *Fuentes-Campos*, respondents suggest the rationale of *Francis* does

not speak to the relative treatment of LPR aliens in deportation proceedings as compared to those in *exclusion* proceedings. In short, respondents contend Avelar-Cruz' equal protection challenge must fail because LPR aliens in deportation proceedings are not similarly situated to LPR aliens in exclusion proceedings.

Respondents argue it is well-established that excludable aliens and deportable aliens are not similarly situated, citing *Landon v. Plasencia*, 459 U.S. 21, 31 (1982). In that case, Plasencia was a legal permanent resident alien who was placed in an exclusion proceeding upon trying to re-enter the United States. Plasencia argued she was entitled to have the question of her admissibility litigated in a deportation proceeding, where she would be entitled to procedural protections and substantive rights not available in exclusion proceedings. The Ninth Circuit agreed, relying in part on *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). The Supreme Court reversed, stating:

> The reasoning of *Chew* was only that a resident alien returning from a brief trip has a right to due process just as would a continuously present resident alien. It does not create a right to identical treatment for these two differently situated groups of aliens.

Landon, 459 U.S. at 31.

Based on this statement, respondents conclude excludable LPR aliens and deportable LPR aliens are not similarly situated for purposes of the present equal protection challenge. But it will not do to transplant the "differently situated" language from *Landon* (a due process challenge) and apply it casually to all equal protection challenges involving deportation and exclusion

proceedings, irrespective of the statute challenged. For purposes of the equal protection clause, the question whether two groups on either side of a governmental classification are similarly situated is not decided in the abstract. Rather, courts must determine whether the two groups are similarly situated *with respect to the purpose of the law challenged*. "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the [law]." Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 636 – 37 (13th ed. 1997) (quoting Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341 (1949)). Accordingly, the threshold question is whether LPR aliens in deportation proceedings and LPR aliens in exclusion proceedings are similarly situated with respect to the purpose of AEDPA § 440(d).

There can be no doubt that with respect to the purpose of § 440(d), LPR aliens in deportation proceedings are similarly situated to LPR aliens in exclusion proceedings. Skimming the legislative history of the AEDPA, there appears to be no reason why Congress would have sought to restrict discretionary relief as to LPR aliens who committed enumerated offenses, but not curtail discretionary relief if those same LPR aliens thereafter leave the country and seek to re-enter. Indeed, *Vargas* and *Jurado-Gutierrez* rejected the differences between deportation and exclusion proceedings as irrelevant for purposes of the present equal protection analysis. *Vargas* states that drawing a distinction based on the name of the proceeding:

> . . . does not respond to the arbitrariness of allowing LPR aliens who have left the U.S. for a

> short time to file for a waiver, while not allowing LPR aliens who have remained in the U.S. the same option. The fact that the proceedings have different names does not affect the fact that two similarly situated LPR aliens are receiving disparate treatment.

Vargas, 966 F. Supp. at 1546-47. *Jurado-Gutierrez* added the following:

> In view of *Francis* and *Vargas*, there appears to be no rational basis for applying the distinction made by the BIA. If petitioner had left the country for a visit to Mexico . . . he would have been entitled to a § 212(c) discretionary hearing. Simply because he did not leave the country, he was placed in deportation proceedings and denied a § 212(c) hearing.

Jurado-Gutierrez, 977 F. Supp. at 1093.

This court shares the view of *Vargas* and *Jurado-Gutierrez*. There is no rational basis for affording LPR aliens who leave the country after their conviction an opportunity to apply for discretionary relief, but denying that same opportunity to other LPR aliens (who are deportable for the same offenses) merely because they failed to travel abroad and remained in the country. Respondents suggest Congress was most concerned with expeditiously removing criminal aliens who are *inside* the United States. This justification is wholly incredible. If the Attorney General grants waivers to LPR aliens in exclusion proceedings, they are allowed *inside* the United States; Congress' purported concern with expeditiously removing criminal aliens who are *inside* the United States

would necessarily be flaunted. Respondents suggest Congress took a legitimate "first step" at reforming the system of discretionary waivers for certain criminal offenses. It is undeniable that Congress may address a problem "one step at a time." However, each step that classifies groups of people and affords them different protection under the law must have a rational basis. Like the courts in *Vargas* and *Jurado-Gutierrez*, this court has searched to find a rational basis to support the distinction at issue. The search has been to no avail.

As interpreted and applied by the BIA in *Fuentes-Campos*, AEDPA § 440(d) violates Avelar-Cruz' equal protection rights. In light of Congress' probable intent, the preferred remedy would be to remove the benefit of a discretionary waiver hearing from both categories of aliens. But the benefit in this instance has already been irrevocably conferred. After the *Fuentes-Campos* decision on May 14, 1997, at least one similarly situated alien in an exclusion proceeding was given a discretionary waiver hearing, while Avelar-Cruz was not. To remedy this equal protection violation, Avelar-Cruz should be granted a hearing pursuant to the old (*i.e.*, pre-AEDPA) § 212(c). The court expresses no opinion on the merits of Avelar-Cruz' application for discretionary relief.

CONCLUSION

Jose Martin Avelar-Cruz' petition for writ of habeas corpus is granted. Accordingly, petitioner is eligible for a waiver under Section 212(c) of the Immigration and

Nationality Act. Petitioner's deportation is stayed pending consideration of his waiver application by an immigration judge.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

April 27, 1998

APPENDIX C

United States District Court
Northern District of Illinois
Eastern Division

AVELAR-CRUZ

v.

RENO, et al.

JUDGMENT IN A CIVIL CASE

Case Number: 98 C 1193

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

It is ordered and adjudged that the petition for writ of habeas corpus is granted.

Michael W. Dobbins, Clerk of Court

/s/ Jacquelyn H. Collier
Jacquelyn H. Collier,
Deputy Clerk

Date: 4/27/1998

APPENDIX D

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A91 342 955 – Chicago Date: JAN – 8 1998

In re: JOSE MARTIN AVELAR-CRUZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: M. Alma Alvardo, Esquire
Legal Services Center for Immigrants
Legal Assistance Foundation of Chicago
111 West Jackson Boulevard,
3rd Floor
Chicago, Illinois 60604-3502

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death

Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997).

You have argued on appeal that AEDPA violates the equal protection clause of the Constitution because the new 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

Accordingly, your appeal is dismissed.

/s/ Fred W. Vacca
FOR THE BOARD

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File No.: A 91 342 955 November 18, 1996

In the Matter of	)	IN DEPORTATION
JOSE M. AVELAR CRUZ	)	PROCEEDINGS
	)	
Respondent	)	
	)	

CHARGES: Section 241(a)(2)(A)(iii), at any time after entry you've been convicted of a crime constituting an aggravated felony; and also under Section 241(a)(2)(B)(i) in that you've been convicted of violating a law of any state in the United States or any foreign country concerning controlled substances.

APPLICATION: Waiver under Section 212(c).

ON BEHALF OF RESPONDENT:

Susan Compernolle, Esquire

ON BEHALF OF SERVICE:

Seth Fitter, Esquire
Assistant District Counsel
INS
Chicago, IL

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 24-year-old married male, who is a native and citizen of Mexico. He was admitted as a permanent resident on May 10, 1989. Prior to that date, however, he became a lawful temporary resident as of September 25, 1987. After a hearing held on June 20, 1994, at Stateville Prison, he admitted the allegations 1 through 5 on his Order to Show Cause, but denied allegations 6 and 7 and denied the charges of deportability. The Court found the Respondent deportable on both charges based on the conviction records presented by the Service at his deportation hearing. Specifically, Exhibits Number 2 and 3. Those convictions records showed that on September 7, 1993, he was convicted of possession of a controlled substance with intent to deliver and delivery of controlled substance. Based on the records of conviction, the Court found him deportable under Sections 241(a)(2)(B)(i) and 241(a)(2)(A)(iii) of the Act.

After Respondent appealed that decision, the Board of Immigration Appeals (hereinafter the Board), in a decision dated November 14, 1994, upheld this finding and agreed that the Respondent, in addition, was statutorily barred from a 212(c) waiver because he had not accrued seven years of domicile in the United States after a lawful admission as a permanent resident. However, on June 27, 1995, the Seventh Circuit in a decision entitled *Avelar Cruz v. INS*, reversed and remanded on the ground that the period that the Respondent had accrued in the United States after admission as a lawful temporary resident counted toward the accumulation of years of unrelinquished domicile.

Finally, on February 7, 1996, the Board remanded the case in order to afford the Respondent "a further opportunity to pursue his application for relief under Section 212(c) of the Act."

The issue presented by the case today is whether the Respondent remains eligible for a 212(c) waiver notwithstanding the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA).

AEDPA barred a 212(c) applicant who is deportable by reason of having committed any criminal offense covered in Sections 241(a)(2)(A)(iii) and (B) of the Act. The Immigration Service contends that the Respondent is barred from the waiver because of its proscription of 212(c) relief for any alien found deportable as an aggravated felon. It further contends that the provision under section 440(d) of AEDPA became effective as of April 24, 1996. The Respondent raises a number of contentions in response.

Respondent's contentions are as follows: First, the Respondent contends that his eligibility for a 212(c) waiver should be restored nunc pro tunc pursuant to the Seventh Circuit's decision in *Batanic* and *Snadier v. INS*. I disagree that those cases control the outcome in this case. I think that *Batanic* is distinguishable on the facts in this case. In *Batanic*, the Seventh Circuit Court of Appeals held that an alien had been denied the right to counsel and also the right to confer with counsel about an application for political asylum. In *Snadier v. INS*, the Seventh Circuit held that an alien should have been notified of his right to counsel after the Service lodged an additional charge of deportability. This case is distinguishable from

both of those cases which implicated procedural due process rights. Both cases involved actions taken or not taken in the course of a deportation hearing. In contrast, the Respondent's procedural due process rights were not impaired by any action which the Immigration Judge took in his prior deportation hearing in 1994. The Immigration Court in that case applied the Board's precedent, in particular, *Matter of Newton*, which required that an alien established seven years of unrelinquished domicile after a lawful admission as a permanent resident. The Board agreed with that decision, but the Seventh Circuit reversed in *Avelar Cruz* and also in *Castillo Contreras v. INS*. In short, the Seventh Circuit applied a different standard than that which was considered by both by either the Immigration Court or by the Board of Immigration Appeals when they considered the case. The Seventh Circuit did not find that the Board erred, but rather established a different precedent for considering such, such [sic] requests.

In addition, the Respondent contends that he filed an application for a 212(c) waiver prior to the effective date of AEDPA and that the Board's reasoning in *Matter of Soriano* should be followed. However, the Attorney General vacated the *Soriano* decision on September 12, 1996 setting aside the Board's finding that an applicant for a 212(c) waiver who had filed the application prior to April 24, 1996 was not barred by AEDPA. The Board held in the *Soriano* decision that even though the general principle of statutory construction is that a law takes effect on the date of its enactment, the Board nonetheless construed another provision, Section 413, of AEDPA to reflect a legislative intent to consider applications filed prior to

April 24, 1996, to construe them under prior law. As I have noted, however, the vacation of the *Soriano* decision effectively eliminated the case and any exception which it had established as precedent in interpreting the AEDPA provisions relating to 212(c) relief.

The Respondent also contends that *Matter of AA* established and interpreted a statutory bar contained in Section 511(b) and held that that bar shall apply to admissions occurring after the date of the enactment of the Act and that it refers to applications submitted after November 29, 1990, rather at a port of entry before a District Director, or before an Immigration Judge in subsequent proceedings. The Respondent argues that the point in time that the application is filed establishes the law under which the application should be considered as a result of this decision in *Matter of AA*. I don't agree that *Matter of AA* supports the Respondent's position. I reach this conclusion because the Board in *Matter of AA* construed a specific statutory bar to 212(c) relief in the applications to which it should be applied. I disagree with the contention of the Respondent that the alien here is seeking to reenter the United States by making an application for a 212(c) waiver. The alien is simply seeking to be restored to the status which he held prior to the institution of deportation proceedings, namely, the status of permanent resident. See *Matter of Balderes,* Int. Dec. 3159 (BIA 1991), citing the proposition that the waiver does not cause criminal convictions to disappear from the alien's record even after a waiver is granted. That those criminal convictions may be considered in subsequent determinations for deportability or for 212(c) relief.

In addition, the Respondent raises the defense of mouse-trapping set forth by the Seventh Circuit in the decision of *Reyes Hernandez v. INS*. In that case, the alien did not contest deportability believing that he was eligible for a 212(c) waiver and he conceded deportability and was allowed to proceed on his application because the Seventh Circuit concluded that to rule otherwise would have allowed him to be mousetrapped into conceding deportability on the expectation that he could apply for a waiver under section 212(c). However, I think that case is distinguishable and is not precedent for this case. In this case, in contrast, the alien never conceded either charge of deportability and effectively denied both the charges and the allegations relating to his criminal convictions. Those allegations and the charges were established by the submission of conviction records. Finding of deportability on both charges has never been contested in any subsequent proceeding. In short, there was no quid pro quo of a concession of the allegations and charges in this case. Furthermore, there is no colorable defense to the charges of deportability either, since the convictions established the Respondent's deportability under both charges.

Finally, the Respondent requests that he be allowed to continue the case so that his spouse can file a visa petition and enable him to qualify for adjustment of status. The Respondent indicates in his brief and has submitted a marriage certificate indicating that he's now married to Lisa Hernandez as of June 22, 1996, and that she is a United States citizen who would petition for him to become a permanent resident. He also states that she is

the mother of his daughter Jasmin. However, I am unwilling to continue the case for the following reasons. First, even if a visa petition were approved, the Respondent would not be eligible for adjustment of status because he has been convicted of a crime constituting an aggravated felony. This situation is quite different from the aliens in *Matter of Gabrielski* and its progeny where the alien would be eligible for adjustment of status if it were granted in conjunction with a 212(c) waiver, but would have been ineligible for adjustment if either relief had been considered separately or alone. Here, the Respondent is ineligible for a 212(c) waiver. In addition, he is barred from adjustment of status. In addition, there is no waiver available to him. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Section 212(h) was amended to bar the waiver from being granted to an alien who had been convicted of a crime constituting an aggravated felony. Consequently, nothwithstanding the Respondent's present relationship with a United States citizen, he would not qualify for adjustment of status even if a visa petition were approved because of the crimes which would bar his admissibility.

In summary, I have concluded the Respondent is barred on a 212(c) waiver pursuant to section 440(d) of AEDPA, which was effective as of April 24, 1996 and makes him ineligible for a 212(c) waiver. There is no other relief available to the Respondent.

The Respondent has designated Mexico as the country of deportation. The Court concurs with that designation. Accordingly, the following orders are entered.

ORDER

IT IS ORDERED that the Respondent's application for a 212(c) waiver be denied.

IT IS FURTHER ORDERED that the Respondent be deported to Mexico pursuant to the charges listed in his Order to Show Cause.

/s/ _____
CRAIG M. ZERBE
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE CRAIG M. ZERBE in the matter of:

JOSE M. AVELAR CRUZ

A 91 342 955

CHICAGO, ILLINOIS

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Susan Ardoin
Susan Ardoin, Transcriber

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881 3344

March 10, 1997
(Completion Date)

APPENDIX F

U.S. DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

Office of the Immigration Judge

In the Matter of: Case No.: A 91-342-955

/s/ Jose Avelar-Cruz Docket: Chicago

RESPONDENT IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 11-18-96.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

[✓] The respondent was ordered deported to Mexico as an aggravated felon.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to _____ or _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[✓] Respondent's application for 212(c) was ( ) granted (✓) denied ( ) withdrawn ( ) other.

[ ] Proceedings were terminated.

[ ] The application for adjustment of status under Section (216) (216A) (245) (249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under Section 246.

[ ] Other _____

[✓] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Pursuant to Sec. 242B
Oral and Written Advisals
were given and served Ref.
"Limitation on Discretionary Relief"

/s/ Illegible
Immigration Judge

Date: 11-18-96

Appeal: RESERVED/WAIVED (A/I/B)

_____

APPENDIX G

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A91 342 955 – Chicago Date: FEB – 7 1996

In re: JOSE MARTIN AVELAR-CRUZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Susan Compernolle, Esquire
Legal Assistance Foundation of Chicago
1661 S. Blue Island Avenue
Chicago, Illinois 60608

ON BEHALF OF SERVICE: Joseph M. Yeung
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] – Convicted of controlled substance violation

Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] – Convicted of aggravated felony

ORDER:

PER CURIAM. Pursuant to the June 27, 1995, decision of the United States Court of Appeals for the Seventh Circuit pertaining to the respondent, the November 14, 1994, decision of the Board is vacated and the record

is remanded to the Immigration Judge. Upon remand, the respondent is to have a further opportunity to pursue his application for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), consistent with the order of the Court of Appeals and the controlling precedent of *Castellon-Contreras v. INS*, 45 F.3d 149 (7th Cir. 1995).

/s/ Illegible
FOR THE BOARD

APPENDIX H

JOSE M. AVELAR-CRUZ, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 94-3721.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

June 2, 1995, Argued

June 27, 1995, Decided

Robert E. Lehrer, LEGAL ASSISTANCE FOUNDATION OF CHICAGO, Chicago, IL. Susan Compernolle (argued), Lisa J. Palumbo, Chicago, IL, for petitioner.

Janet Reno, U.S. Atty. Gen., OFFICE OF U.S. ATTY. GEN., Washington, DC, A. D. Moyer, Samuel Der-Yeghiayan, I.N.S., James B. Burns, OFFICE OF U.S. ATTY., Chicago, IL, William J. Howard, Robert Kendall, Jr., David M. McConnell, Norah Ascoli Schwarz (argued), U.S. DEPT. OF JUSTICE, Civ. Div., Immigration Litigation, Washington, DC, for respondent.

Before CUMMINGS, KANNE, and ILANA DIAMOND ROVNER, Circuit Judges.

ILANA DIAMOND ROVNER, Circuit Judge. Jose M. Avelar-Cruz petitions for review of a final order of the Board of Immigration Appeals (the "Board" or "BIA") finding him statutorily ineligible to seek a discretionary waiver of deportation under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). The Board determined that Avelar-Cruz had not accumulated the

seven consecutive years of lawful unrelinquished domicile required for relief under that statute. In petitioning for review of that decision, Avelar-Cruz relies on our decision in *Castellon-Contreras v. INS*, 45 F.3d 149 (7th Cir. 1995), which rejected the Board's position that an alien must be a lawful permanent resident to be lawfully domiciled in this country under section 212(c). We held instead that an alien may establish a lawful domicile and thus begin to accumulate time toward the seven-year requirement when he becomes a "lawful temporary resident" under section 245A(a) of the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1255a(a). Avelar-Cruz became a lawful temporary resident more than seven years prior to the Board's decision here, and he therefore argues that under *Castellon-Contreras*, he is statutorily eligible for section 212(c) relief. Because we agree that *Castellon-Contreras* is controlling and that it entitles Avelar-Cruz to relief from the Board's order, we grant his petition for review.

I.

Avelar-Cruz was born in Mexico and entered the United States illegally in 1975. He became a lawful permanent resident on May 10, 1989, pursuant to IRCA's general amnesty provision, 8 U.S.C. § 1255a(b). Prior to that, however, Avelar-Cruz had become a lawful temporary resident on September 25, 1987, when he submitted an application pursuant to 8 U.S.C. § 1255a(a) and paid the application fee. *See Castellon-Contreras*, 45 F.3d at 154; 8 C.F.R. § 245a.2(s) ("The status of an alien whose application for temporary resident status is approved shall be adjusted to that of a lawful temporary resident as of the

date indicated on the application fee receipt issued at Service Legalization Office."). The present deportation proceedings were commenced after Avelar-Cruz pled guilty to two drug charges in the Circuit Court of Cook County, Illinois. The Immigration Judge ("IJ") found Avelar-Cruz deportable (*see* 8 U.S.C. §§ 1251(a)(2)(A)(iii) & 1251(a)(2)(B)(i)), and Avelar-Cruz then applied for a discretionary waiver of deportation under section 212(c).[1] The IJ denied that request, finding that Avelar-Cruz had not yet accumulated the seven years of lawful unrelinquished domicile required for section 212(c) relief. The IJ therefore ordered that Avelar-Cruz be deported to Mexico.

In appealing the IJ's ruling to the Board, Avelar-Cruz argued that he was eligible for section 212(c) relief under two alternative theories – because he became a lawful domiciliary on the effective date of IRCA, November 6, 1986, or when he became a lawful temporary resident on September 25, 1987. The Board addressed and rejected both positions, finding that Avelar-Cruz had become a

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[1] That section provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .

8 U.S.C. § 1182(c). Although the section on its face is addressed only to returning residents, we have applied it as well "to lawful permanent residents who have not left the United States but [who] meet the seven-year requirement and face deportation." *Cortes-Castillo v. INS*, 997 F.2d 1199, 1202 (7th Cir. 1993); *see also Henry v. INS*, 8 F.3d 426, 430 n.4 (7th Cir. 1993).

lawful domiciliary only when he obtained the status of lawful permanent resident on May 10, 1989. Thus, on November 14, 1994, the Board affirmed the IJ's deportation order.

In petitioning for review of the Board's order, Avelar-Cruz contends that our recent decision in *Castellon-Contreras* makes clear that he is eligible for a discretionary waiver of deportation under section 212(c). In that case, we considered the meaning of the phrase "lawful unrelinquished domicile" and rejected the Board's position that only a "lawful permanent resident" could be lawfully domiciled in this country for purposes of section 212(c). 45 F.3d at 152, 153. That position, we explained, was inconsistent with the plain meaning of the phrase "lawful unrelinquished domicile," as "domicile" traditionally has been understood only "to mean physical presence and the intent to remain somewhere indefinitely." *Id.* at 153. For a domicile to be lawful, then, the alien need not necessarily obtain lawful permanent residency but must at least "have the ability, under the immigration laws, to form the intent to remain in the United States indefinitely." *Id.*; *see also Lok v. INS*, 681 F.2d 107, 109 (2d Cir. 1982). We concluded that by applying for amnesty under IRCA and becoming a lawful temporary resident, an alien could form the requisite intent to remain in this country indefinitely, because at that point, he could have his status adjusted to that of lawful permanent resident simply by residing continuously in the United States and submitting the required application. *Castellon-Contreras*, 45 F.3d at

154.[2] We therefore held that an alien could establish a lawful domicile in this country under section 212(c) by becoming a lawful temporary resident under IRCA. *Id.* The Ninth Circuit recently reached the same conclusion in *Ortega de Robles v. INS, No. 93-70461, 1995 U.S. App. LEXIS 13510,* * 13-16 (9th Cir. June 2, 1995).

Because Avelar-Cruz became a lawful temporary resident under IRCA on September 25, 1987, he accumulated seven consecutive years of lawful unrelinquished domicile before the Board affirmed the IJ's order of deportation on November 14, 1994.[3] Under *Castellon-Contreras,* then, Avelar-Cruz is eligible for a discretionary waiver of deportation under section 212(c).

II.

The INS, however, advances two arguments to avoid the result compelled by *Castellon-Contreras.* First, it insists

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[2] At the same time, we rejected the petitioner's argument that he had become a lawful domiciliary on the effective date of IRCA because in applying for temporary resident status, he conceded that he was in this country illegally even after the statute's effective date. *Id.* (citing 8 U.S.C. § 1255(a)(2)(A)).

[3] Our cases hold that lawful permanent resident status is lost only once the Board affirms the order of deportation entered by the Immigration Judge, resulting in a final order of deportation. *See, e.g., Castellon-Contreras,* 45 F.3d at 155 n.8; *Variamparambil v. INS,* 831 F.2d 1362, 1366-67 (7th Cir. 1987); *see also Henry,* 8 F.3d at 434-35 ("Our decision in *Variamparambil* means only that lawful permanent resident status terminates upon entry of a final order of deportation for purposes of fulfilling the seven years of lawful unrelinquished domicile required for section 212(c) relief.").

that Avelar-Cruz failed to exhaust his administrative remedies because he never argued to the Immigration Judge that the seven-year period of lawful unrelinquished domicile commenced when he became a lawful temporary resident. Alternatively, the INS contends that even if Avelar-Cruz properly preserved that argument, *Castellon-Contreras* is not controlling because its discussion of lawful temporary residence is dicta. Neither argument is persuasive.

Although Avelar-Cruz readily concedes that he never based his section 212(c) argument before the IJ on his status as a lawful temporary resident, he advances an eminently reasonable explanation for that omission – the deportation hearing was not seven years removed from the date that he became a lawful temporary resident. Thus, such a theory would not have helped Avelar-Cruz before the IJ. As a result, Avelar-Cruz argued only that he had become a lawful domiciliary on the effective date of IRCA. While his case was on appeal to the Board, however, Avelar-Cruz celebrated the seventh anniversary of his status as a lawful temporary resident. In his brief to the Board, therefore, Avelar-Cruz pointed both to IRCA's effective date and to the date he became a lawful temporary resident as establishing his lawful domicile in this country. The Board fully recognized that Avelar-Cruz was also relying on his status as a lawful temporary resident under IRCA to support his request for section 212(c) relief, and the Board did not suggest that it considered the argument either unexhausted or waived. To the contrary, the Board considered the argument on its merits and rejected it. It of course is the decision of the Board, not that of the IJ, that we have jurisdiction to review. *See*

Balazoski v. INS, 932 F.2d 638, 640 (7th Cir. 1991); *see also Cordoba-Chaves v. INS*, 946 F.2d 1244, 1246 (7th Cir. 1991). Because the Board did not consider the argument waived and addressed its merits, we have jurisdiction to review the Board's resolution of that issue. *See, e.g., Cipriano v. INS*, 24 F.3d 763, 764 (5th Cir. 1994); *Douglas v. INS*, 28 F.3d 241, 245 (2d Cir. 1994); *Waldron v. INS*, 17 F.3d 511, 515 n.7 (2d Cir.), *cert. denied*, 130 L. Ed. 2d 489, 115 S. Ct. 572 (1994); *cf. Henry v. INS*, 8 F.3d 426, 439 n.19 (7th Cir. 1993) (refusing to consider argument raised for the first time in a petition for review when petitioner had the opportunity but failed to raise the argument before the Board).

Having concluded that the temporary residence argument is properly before us, we must consider the Service's alternative position that *Castellon-Contreras* is not controlling because its discussion of that issue is dicta. That position is based on our ultimate conclusion in *Castellon-Contreras* that the petitioner was ineligible for section 212(c) relief because he had not accumulated seven years of lawful unrelinquished domicile after becoming a temporary resident. *See* 45 F.3d at 154-55. Because Castellon-Contreras was not eligible for relief even under the panel's interpretation of the statute, the Service maintains that the decision's discussion of temporary residence is non-binding dicta. We disagree.

The proper interpretation of the phrase "lawful unrelinquished domicile" in section 212(c) was squarely presented by the parties and addressed by the panel in *Castellon-Contreras*, 45 F.3d at 152. The Board had held that "lawful unrelinquished domicile" should be equated with "lawful permanent residence," whereas Castellon-

Contreras maintained that he had established a lawful domicile on IRCA's effective date even if he was not yet a permanent resident of this country. We rejected both positions, holding instead that an alien could establish a lawful domicile by becoming a lawful temporary resident under 8 U.S.C. § 1255a(a). *Id.* at 154. Although that conclusion did not help Castellon-Contreras, our considered interpretation of the statutory language was not thereby relegated to the status of obiter dictum. We could only determine whether Castellon-Contreras was eligible for section 212(c) relief by first deciding when he had established a lawful domicile in this country. That issue therefore received extended treatment in the panel's opinion. *Cf. United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988). The panel explicitly ruled that Castellon-Contreras became a lawful domiciliary when he acquired the status of lawful temporary resident under IRCA. *Castellon-Contreras*, 45 F.3d at 154. Although that holding ultimately did not make Castellon-Contreras eligible for relief under section 212(c), it was not dicta. *See Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993) ("explicit rulings on issues that were before the higher court . . . are not dicta.").

III.

Castellon-Contreras applies to Avelar-Cruz' case and is controlling. Under that decision, Avelar-Cruz became a lawful domiciliary on September 25, 1987, when he became a lawful temporary resident under IRCA's amnesty provisions. He thus accumulated seven consecutive years of lawful unrelinquished domicile prior to the entry of a final order of deportation by the Board. As a

result, he is eligible to be considered for a discretionary waiver of deportation under section 212(c). We therefore GRANT the petition for review and REMAND to the Board for further proceedings consistent with this opinion.

IT IS SO ORDERED.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

GARY LAGUERRE, Plaintiff,	)	No. 97 C 8225
v.	)	
JANET RENO, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

Gary Laguerre ("Laguerre") petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2241, Art. I, § 9, cl. 2 of the Constitution, and 28 U.S.C. § 1331.[1] Laguerre seeks review of a final order of deportation. He contends he is being held in custody in violation of his statutory rights under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., and in violation of due process because of an immigration judge's retroactive application of § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") during his deportation hearing. Pub. L. No. 104-132, 110 Stat. 1214 (1996). In the alternative, he moves to reopen his deportation proceeding so that he may present a colorable defense to deportation. Laguerre names Janet Reno, Attorney General of the United States, Doris Meissner, Commissioner of the Immigration and Naturalization Service ("the

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[1] Laguerre's initial petition was filed on November 24, 1997. An amended petition, containing new and revised factual allegations, was filed on December 24, 1997.

INS"), and Brian Perryman, Chicago District Director of the INS, as respondents. Respondents move to dismiss the amended petition for lack of subject matter jurisdiction and for failure to allege a constitutional violation upon which relief may be granted. In the alternative, respondents move for summary judgment. Laguerre responds to the motion to dismiss and files a cross-motion for summary judgment.

BACKGROUND

The following background facts are drawn from the certified administrative record of the INS proceedings and the parties' statements of undisputed facts.[2] Laguerre is a twenty-four year old citizen of Haiti who lawfully entered the United States as a permanent resident alien on August 13, 1985. R.1; Resp. 12(M) ¶ 1; Am. Pet. ¶¶ 3,5. On February 23, 1995, Laguerre pled guilty to one count of delivery of a controlled substance containing cocaine, in violation of 720 ILCS 570/401(C)(2); and one count of delivery of a controlled substance containing cocaine within 1000 feet of a school, in violation of 720 ILCS 570/401(C)(2) and 720 ILCS 570/407(B)(1). R. 2-8; Resp. 12(M) ¶ 2; Am. Pet. ¶ 8. Laguerre was given concurrent sentences of four years for these offenses. R. 2-8; Am. Pet. ¶ 10. The circuit court judge turned Laguerre over to the custody of the Illinois Department of Corrections ("IDOC"). Am. Pet. ¶ 9. He recommended petitioner for

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[2] References to the certified administrative record are cited as "R." References to Laguerre's amended petition for a writ of habeas corpus are cited as "Am. Pet. ¶" and references to respondents' statement of undisputed facts as "Resp. 12(M)."

impact incarceration under 730 ILCS 5/5-8-1.1, a form of boot camp for youthful offenders between the ages of 17 and 29. *Id.* The IDOC determined that Laguerre was ineligible for the boot camp because of his immigration status. *Id.* ¶ 11. Consequently, he was incarcerated at Sheridan Correctional Center ("Sheridan"). Am. Pet. ¶¶ 12; Resp. 12(M) ¶ 3.

Laguerre served thirteen months at Sheridan. Am. Pet. ¶ 12; Resp. ¶ 3. In the interim, on December 19, 1995, INS issued an order to show cause against Laguerre alleging that he was deportable under the INA, as an aggravated felon under 8 U.S.C. § 1251(a)(2)(A)(iii) and for violations of a law in relation to controlled substances as provided in 8 U.S.C. § 1251(a)(2)(B)(i). R. 9-15; Resp. 12(M) ¶ 4.[3] Upon release from incarceration at Sheridan

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[3] Sections 1251(a)(2)(A)(iii) and (a)(2)(B)(i) provide:

(A) General Crimes

. . . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after entry is deportable.

. . . .

(B) Controlled Substances

(i) Conviction

Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

in March 1996, Laguerre was taken into INS custody and transferred to a detention center in El Paso, Texas. Am. Pet. ¶ 14; Resp. 12(M) ¶ 3. On April 11, 1996, he filed a motion for change of venue to Chicago, Illinois. R. 16-17; Am. Pet. ¶ 17; Resp. 12(M) ¶ 5. On April 18, 1996, pursuant to a telephonic bond hearing in El Paso, the immigration judge ordered Laguerre released from INS custody under a $5,000 bond; but the bond was not posted at that time. R. 18; Am. Pet. ¶ 16; Resp. 12(M) ¶ 6. Laguerre subsequently filed a motion for change of venue or, in the alternative, to withdraw. R. 19-20; Resp. 12(M) ¶ 7. Telephonic change of venue hearings were held on April 25, 1996 and May 2, 1996. R. 24-33; Resp. 12(M) ¶ 8. On May 2, 1996, an order changing venue to Chicago was entered, over INS' objections. R. 21, 27-33; Am. Pet. ¶ 19; Resp. 12(M) ¶ 8.

The INS proceedings resumed in Chicago. On June 5, 1996, the immigration judge ordered Laguerre released from custody on a $5,000 bond. R. 22-23; Am. Pet. ¶ 19; Resp. 12(M) ¶ 9. On October 3, 1996, Laguerre was afforded a deportation hearing before an immigration judge in Chicago. R. 34-53; Am. Pet. ¶ 19. At the hearing, Laguerre acknowledged his conviction for delivery of a controlled substance containing cocaine. R. 14, 38-39. Initially, however, he denied his conviction for delivery of a controlled substance containing cocaine within 1000 feet of a public school in violation of 720 ILCS 570/401(C)(2) and 407(B)(1). R. 39; Resp. 12(M) ¶ 10. At that point, INS introduced Laguerre's certified record of convictions from the Circuit Court of Cook County. R. 2-8, 39. Shortly thereafter, it became apparent that Laguerre's initial reluctance to admit the conviction was not based on any

substantive rationale, but on the technical accuracy of the use of a small b in place of a capital B in the citation to 720 ILCS 570/407(B)(2) on the INS form I-831 (the charge form appended to the order to show cause). R. 14, 38-40. With Laguerre's consent, the immigration judge amended the charge form by hand to accord with Laguerre's contention that the citation required a capital B. R. 14, 40.

Next, Laguerre conceded deportability on both charges. R. 40-41; Resp. 12(M) ¶ 10. Laguerre then sought to apply for a waiver of deportability pursuant to section 212(c) of the INA [codified at 8 U.S.C. § 1182(c)]. R. 41; Am. Pet. ¶ 22; Resp. 12(M) ¶ 13. The INS opposed Laguerre's waiver application on the ground that § 440(d) of the AEDPA rendered him ineligible due to his convictions for an aggravated felony and controlled substance offense. R. 42; Resp. 12(M) ¶ 14.[4] The immigration judge

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[4] Prior to enactment of the AEDPA, criminal aliens could seek a discretionary waiver of deportation under section 212(c) of the INA. Section 212(c) stated in relevant part:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .

8 U.S.C. § 1182(c). Section 440(d) amended § 212(c) by adding language rendering criminal aliens in Laguerre's situation ineligible:

> This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are,

concurred with the INS position and held Laguerre statutorily ineligible to apply for a waiver of deportation. R. 45, 48-52; Am. Pet. ¶ 23; Resp. 12(M) ¶ 15. Accordingly, the immigration judge entered an order deporting Laguerre to Haiti. *Id.*

Laguerre filed a timely appeal of the deportation order to the Board of Immigration Appeals ("BIA"). R. 54-55; Am. Pet. ¶ 24; Resp. 12(M) ¶ 16. He argued that the immigration judge erred in denying his request to file the 212(c) petition because the legislative changes do not apply retroactively to his case. R. 54-55; Am. Pet. ¶ 24. On August 1, 1997, the BIA rendered a *per curiam* decision affirming the immigration judge and dismissing Laguerre's appeal. R. 56; Am. Pet. ¶ 25; Resp. 12(M) ¶ 16.

On November 5, 1997, the INS notified Laguerre to report for deportation to Haiti on November 25. Am. Pet. ¶ 27; Resp. 12(M) ¶ 17. On Thursday, November 20, Laguerre visited the INS office in Chicago to request an extension of time to depart the United States. Am. Pet. ¶ 27. He was taken into INS custody that day. Am. Pet. ¶ 27; Resp. 12(M) ¶ 17. He is currently detained under INS authority at the DuPage County Jail in Wheaton, Illinois. Am. Pet. ¶ 28. He filed the first petition for writ of habeas corpus on November 24, 1997. An amended petition was filed on December 24, 1997.

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without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

DISCUSSION

I. JURISDICTION

The court must first address whether the jurisdictional restrictions enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996), deprive it of subject matter jurisdiction over Laguerre's petition for a writ of habeas corpus. Laguerre alleges jurisdiction under 28 U.S.C. § 2441, Art. I, § 9 cl. 2 of the Constitution, and 28 U.S.C. § 1331. Respondents contend that section § 242(g) of the INA, 8 U.S.C. § 1252(g), as amended by § 306(a) of IIRIRA, requires dismissal of the petition for lack of subject matter jurisdiction. Laguerre asserts, in essence, that despite IIRIRA's significance for judicial review of final orders of deportation, the court retains jurisdiction to consider the merits of habeas petitions pursuant to § 2441 because Congress did not affirmatively repeal habeas review under that statute. Alternatively, Laguerre invokes jurisdiction under the Suspension Clause of Article 1, section 9, clause 2 of the Constitution.

A. LEGISLATIVE BACKGROUND

The jurisdictional provisions of the INA have recently undergone a rapid succession of legislative amendments, all aimed at curtailment of federal court jurisdiction over INS administrative decisions and adjudications. In particular, Congress has taken steps apparently intended to limit the federal courts' jurisdiction over petitions for habeas corpus involving INS matters.

First, Congress enacted the AEDPA on April 24, 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section § 404(e) of the AEDPA eliminated the INA provision governing habeas corpus review of deportation proceedings. Formerly, INA § 106(a)(10) provided: "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105(a)(10) (1994). Section 404(a) of the AEDPA replaced § 106(a)(10) with the following provision: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), (D) [of the INA] . . . shall not be subject to review by any court." 110 Stat. 1214, 1276-77. Second, on September 30, 1996, Congress enacted IIRIRA. Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996). IIRIRA repealed § 106 of the INA and replaced it with a new INA § 242 entitled "Judicial Review of Orders of Removal." IIRIRA § 306, codified at 8 U.S.C. § 1252.[5] Specifically, IIRIRA § 306(a)(2)(C) replaced AEDPA § 404(a). The new provision reads: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense . . . . " INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

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[5] The IIRIRA replaces the familiar term "deportation" with the term "removal."

B. APPLICABLE JURISDICTIONAL PROVISION

Instead of relying on IIRIRA § 306(a)(2)(C), respondents premise their subject matter jurisdiction argument on the effect of IIRIRA's broad jurisdictional provision found in § 306(a). Section 306(a) creates a new section 242(g) of the INA, entitled "Exclusive Jurisdiction." 8 U.S.C. § 1252(g). The new section provides:

> Except as provided in this section and notwithstanding any other provisions of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g). Laguerre does not directly challenge respondents' argument that the language of this section encompasses his claims. Rather, Laguerre raises the issue whether his petition is governed by § 242(g), as opposed to IIRIRA's transitional rules, which the statute makes applicable to persons in deportation proceedings commenced before April 1, 1997. *See* IIRIRA § 309.

Laguerre's argument raises a question of statutory construction: whether IIRIRA § 242(g) or IIRIRA's transition provisions, specifically § 309(c)(4)(G), govern the court's subject matter jurisdiction over the petition. A resolution of this question depends on both the relative effective dates of IIRIRA's statutory provisions and on their substantive scope. In general, the effective date of IIRIRA's amendments is "the first day of the first month beginning more than 180 days after the date of enactment

[September 30, 1996]" or April 1, 1997. § 309(a). Yet, § 309(c) creates transitional rules delaying implementation of IRRIRA's amendments for aliens in exclusion or deportation proceedings before April 1, 1997. In addition, § 309(a) excepts §§ 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) from the general effective date. The effective date provision for § 242(g) is found in § 306(c)(1). The section, as amended by technical corrections on October 11, 1996, Pub. L. 104-302, 110 Stat. 3656, 3657, provides:

> (c) EFFECTIVE DATE
>
> (1) IN GENERAL – Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection(a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Although manifesting a clear intent that the provision be applied retroactively, Congress failed to provide a date for § 242(g). Thus, the question arises whether § 242(g) was meant to take effect on the date of IIRIRA's enactment, as opposed to April 1, 1997.

The Seventh Circuit resolved this issue in *Lalani v. Perryman*, 105 F.3d 334 (7th Cir. 1997) (per curiam). In *Lalani*, the government argued that § 242(g) took effect on the date of enactment and thus deprived the court of jurisdiction over the appeal. The Seventh Circuit rejected this construction of the statute. The Seventh Circuit recognized that to interpret the statute in this manner would render meaningless "the provisions of the IIRIRA [the

transition rules] deferring application of its procedures for six months . . . because [the court] would have no jurisdiction in all cases immediately." *Id.* at 336. Noting that § 306(c) refers back to § 309, the Seventh Circuit held that § 242(g) would not take effect until April 1, 1997 – the general effective date provision. Finally, unlike the other subsections, § 242(g) applies retroactively to past and pending deportation proceedings.

IIRIRA's transition provisions delay the implementation of IIRIRA's amendments governing judicial review, including § 306(a)(2)(C). *See Turkhan v. INS*, 123 F.3d 487, 489 (7th Cir. 1997) ("Section 309 of the II[RI]RA . . . makes these new judicial review provisions inapplicable to aliens who are in deportation proceedings [before] April 1, 1997"); *see also Yang v. INS*, 109 F.3d 1185, 1191 (7th Cir. 1997) ("the II[RI]RA covers removal proceedings begun during or after . . . April"). The transition provisions state, in relevant part:

> (c) TRANSITION FOR ALIENS IN PROCEEDINGS –
>
> > (1) GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before [April 1, 1997] –
> >
> > > (A) the amendments made by this subtitle shall not apply, and
> > >
> > > (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.
> >
> > . . . .

> (4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW – In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act [after October 30, 1996] notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –
>
> . . . .
>
> (G) there shall be no appeal in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect on the date of enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

IIRIRA § 309(c). Provided Laguerre satisfies the criteria set forth above, he may benefit from the delayed implementation of the IIRIRA's more restrictive judicial review provisions.

Laguerre meets the statutory timing requirements for application of the transitional rules governing judicial review. First, his deportation proceedings commenced before April 1, 1997. Second, the deportation order became final after October 30, 1996. The BIA dismissed

Laguerre's appeal on August 1, 1997. On similar facts, courts have determined that § 309(c)(4)(G) is applicable. *See, e.g., Turkhan,* 123 F.3d at 488-89 (BIA denied motion to reopen on May 9, 1997); *Sandoval v. Reno,* Civ. No. 97-7289, 1997 U.S. Dist. Lexis 20976, *12-15 (ED. Pa. Dec. 30, 1997) (BIA dismissed appeal on July 16, 1997). Finally, because the transition rules only supersede contrary provisions of the pre-IIRIRA law, § 440(a) of the AEDPA (INA § 106(a)(10)) would also apply. *See Turkhan,* 123 F.3d at 489.

Respondents urge that application of § 242(g) is required and it precludes habeas review of Laguerre's petition. The difficulty with this argument is that if § 242(g) operated to divest the district court of jurisdiction over Laguerre's habeas petition, it would render superfluous IIRIRA's specific provision governing jurisdiction for review of criminal alien deportations. *See* § 306(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C). In addition, retroactive application of § 242(g) would thwart application of the related transition provision for aliens in deportation proceedings. *See* § 309(c)(4)(G). Two familiar maxims of statutory construction support application of the specific IIRIRA provision. First, the specific takes precedence over the general. *Resolution Trust Corp. v. Gallagher,* 10 F.3d 416, 420 (7th Cir. 1993). Second, a court is to give effect to all statutory provisions whenever possible. *See In re Lifschultz Fast Freight Corp.,* 63 F.3d 621, 628 (7th Cir. 1995); *see also United States v. Wagner,* 29 F.3d 264, 266 (7th Cir. 1994).

IIRIRA § 306(a)(2)(C) is entitled "Orders Against Criminal Aliens" and is located in a subsection of INA § 242 entitled "Matters Not Subject to Judicial Review." The language of this subsection mirrors the language of § 242(g). For instance, both provisions contain the core

phrase "notwithstanding any other provision of law, no court shall have jurisdiction." Just as § 242(g) seems gauged to divest federal courts of jurisdiction over all judicial review of administrative decisions or actions of the attorney general, including habeas corpus petitions, so does § 306(a)(2)(C) seem to divest federal courts of all judicial review of criminal alien deportations under enumerated sections. If the scope of § 242(g) is as broad as respondents claim, its application would render § 306(a)(2)(C) meaningless. Thus, in order to give full effect to the precise language of § 306(a)(2)(C), and the related transition provision, § 309(c)(4)(G), the court finds Laguerre's claims beyond the scope § 242(g). Laguerre's petition seeks habeas review of a final order of deportation based on his criminal alien status pursuant to INA §§ 241(a)(2)(A)(iii) and 241(a)(2)(B)(i).[6] His petition is only incidentally directed at a "decision or action of the Attorney General to commence proceedings, adjudicate

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[6] § 440(b) of the AEDPA amended 8 U.S.C. § 1101 by adding the following definition of order of deportation:

> (47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that such an alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of –
>
> (i) a determination by the Board of Immigration Appeals affirming such order or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration appeals.

8 U.S.C. § 1101(a)(47).

cases, or execute removal orders." § 242(g). Accordingly, the broad terms of § 242(g) do not govern this case.

C. JURISDICTION PURSUANT TO § 2241

The next inquiry required is whether the court retains subject matter jurisdiction over Laguerre's petition pursuant to 28 U.S.C. § 2241, despite the restrictive language of both § 440(a) and its IIRIRA counterpart, § 309(c)(4)(G). No federal appellate court has directly reached this issue. Yet, a number of appellate courts have addressed the constitutionality of § 440(a)'s restrictions on appellate review. In concluding that Congress could constitutionally divest the appellate courts of jurisdiction over direct appeals from final deportation orders, a number of federal appeals courts have assumed the continuing availability of federal habeas relief. *See, e.g., Chow v. INS,* 113 F.3d 659, 669 (7th Cir. 1997) ("Thus, we cannot say that section 106(a) of the INA is Chow's only avenue of judicial review, and because other avenues for relief remain open, we hold that section 440(a) does not violate Chow's due process rights"); *Kolster v. INS,* 101 F.3d 785, 790-91 (1st Cir. 1996); *Hincapie-Nieto v. INS,* 92 F.3d 27, 30-31 (2d Cir. 1996); *Salazar-Haro v. INS,* 95 F.3d 309, 311 (3d Cir. 1996). Further, a growing majority of district courts across the nation, including this court, have already concluded that federal habeas relief remains available under § 2241. *Gutierrez-Martinez,* ___ F. Supp. ___, 97 CV3361TWT, 1998 WL 7459 (N.D. Ga. Jan. 8, 1998); *Morisath v. Smith,* ___ F. Supp. ___, No. C 97-12392, 1997 WL 797664 (WD. Wash. Dec. 23, 1997); *Mojica v. Reno,* 970 F. Supp. 130 (E.D.N.Y 1997); *Ozoanya v. Reno,* 968 F. Supp.

1 (D.D.C. 1997); *Vargas v. Reno*, 966 F. Supp. 1537 (S.D. Cal. 1997); *Yesil v. Reno*, 958 F. Supp. 828 (S.D.N.Y. 1997), *reconsid. den.*, 973 F. Supp. 372 (S.D.N.Y. 1997); *Dunkley v. Perryman*, No. 96 C 3570, 1996 WL 464191 (N.D. Ill. Aug. 7, 1996); *Mbiya v. INS*, 930 F. Supp. 609 (N.D. Ga. 1996); *Powell v. Jennifer*, 937 F. Supp. 1245 (E.D. Mich. 1996). Finally, in *Sandoval*, the district court reached the identical conclusion with respect to IIRIRA § 309(c)(4)(G). 1997 U.S. Dist. Lexis 20976.

The conclusion that habeas jurisdiction persists under § 2241 is mandated, in large part, by the Supreme Court's recent opinion in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996). In *Felker*, the Supreme Court addressed the effects of AEDPA's gatekeeping mechanism on the Court's original jurisdiction over habeas petitions. The challenged AEDPA provisions were designed to restrict the filing of successive habeas petitions. The Supreme Court premised its analysis of the AEDPA provision on the presumption against repeal of habeas corpus jurisdiction by implication. *Ex parte Yerger*, 8 Wall. 85, 19 L. Ed. 332 (1869). Finding no affirmative mention of the Court's authority to hear habeas petitions in Title I of the AEDPA or in the specific section restricting the Supreme Court's appellate jurisdiction, the Court declined to find a repeal of its jurisdiction over original petitions pursuant to § 2241 or § 2254.

Felker's presumption against repeal by implication compels the conclusion that the general language of § 440(a) does not eliminate subject matter jurisdiction over habeas corpus petitions pursuant to § 2241. *See, e.g., Yesil*, 958 F. Supp. at 838 ("Sections 401 and 440 of the AEDPA do not state that they repeal or amend section

2241; indeed, they do not mention section 2241 at all"); *Mojica*, 970 F. Supp. at 160 ("The AEDPA does not amend, or even mention, section 2241 of Title 28"). *Felker* applies with even greater force in the context of § 309(c)(4)(G) because Congress substituted the narrower term "appeal" for § 440(a)'s "review." *See Sandoval*, 1997 U.S. Dist. Lexis at 22-23; *see also Mojica*, 970 F. Supp. at 160. Accordingly, neither § 440(a), nor § 309(c)(4)(G), operates to preclude this court's exercise of jurisdiction over Laguerre's petition pursuant to § 2241.

Finally, the court must determine whether Laguerre meets the jurisdictional requirement of § 2241. First, Laguerre must be "in custody under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1). The parties agree that Laguerre is currently in INS custody. Second, Laguerre's petition alleges he is "in custody in violation of the Constitution [and] laws . . . of the United States." § 2241(c)(3). Accordingly, Laguerre has met the "in custody" requirement of jurisdiction of 28 U.S.C. § 2241, supporting subject matter jurisdiction.

II. TIMING OF CONCESSION OF DEPORTABILITY

Laguerre raises a factual issue about the timing of his concession of deportability. Laguerre contends he conceded deportability on two occasions prior to the enactment of the AEDPA on April 24, 1996. First, he contends that he conceded deportability in the initial motion to change venue filed in El Paso, Texas on April 11, 1996. Second, he suggests he conceded deportability at the bond hearing conducted on April 18, 1996. Respondents assert that the certified administrative record does not

support this claim. In respondents' view, Laguerre's concession of deportability was not made until the October 3, 1996 deportation hearing in Chicago.

The timing of the concession is relevant to Laguerre's substantive claims. If Laguerre conceded deportability prior to the enactment of AEDPA § 440(d), which rendered him ineligible to apply for a discretionary waiver of deportation, Laguerre could argue that § 440(d) was unconstitutionally retroactive as applied to his pending application for waiver under former INA § 212(c). In addition, he could properly seek to reopen the deportation proceedings in reliance on the Seventh Circuit's opinion in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996). Thus, before ruling on the merits of these issues, the court addresses this factual dispute to determine whether there is factual support for Laguerre's contentions.

As regards Laguerre's first contention, respondents take the position that concessions of deportability are made only at formal deportation hearings, not in the context of change of venue motions. In response, Laguerre cites the BIA's decision in *Matter of Velasquez*, 19 I & N Dec. 377 (BIA 1986), for the general principle that an alien can concede deportability in a change of venue motion. *Velasquez* does stand for the proposition that a concession of deportability in a change of venue motion may be construed as a binding admission, and can therefore be used against the alien in a formal deportation proceeding. Nevertheless, the case is factually inapposite. In *Velasquez*, the alien's attorney submitted a change of venue motion admitting all of the factual allegations in the order to show cause and conceding deportability. 19

I & N at 378. Laguerre's change of venue motion admitted, at most, two components of the factual allegations in the order to show cause. R. 9-14.[7] Laguerre relies on the following statement, in the first paragraph of the motion to change venue, as his concession of deportability: "The Respondent was convicted on February 23, 1995, in the Circuit Court of Cook County, Illinois, and subsequently was sentenced to prison time in Illinois State Prison." R. 17. The paragraph simply admits that Laguerre was convicted on the date charged, February 23, 1995, and that the conviction was obtained in the Circuit Court of Cook County. These are basic components of paragraphs five and six in the order to show cause. R. 14. The motion does not admit key factual allegations of the order to

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[7] The INS order to show cause contained six factual allegations:

> 1) You are not a citizen or national of the United States.
>
> 2) You are a native of HAITI and a citizen of HAITI.
>
> 3) You entered the United States at or near MIAMI FL on or about 8/13/85.
>
> 4) At that time you entered as an immigrant.
>
> 5) You were, on 2/23/95, convicted in the Circuit Court of Cook County for the offense of Delivery of Controlled Substance (Cocaine), an aggravated felony, in violation of Chapter 720-570/401(C)(2) of the Illinois Revised Statutes.
>
> 6) You were, on 2/23/95, convicted in the Circuit Court of Cook County for the offense of Delivery of Controlled Substance [sic] an aggravated felony, in violation of 720-570/401(c)(2)/407(B) [as amended on 10/3/1996] (1) of the Illinois Revised Statutes.

R. 9,14.

show cause, such as the precise crimes for which Laguerre was convicted. Further, unlike *Velasquez*, the motion does not state that Laguerre concedes deportability based on the alleged offenses. Accordingly, the language in the motion to change venue can neither be construed as an admission of the factual allegations supporting his deportation, nor as an ultimate concession of deportability.

Next, Laguerre implies that his attorney conceded his deportability during a bond hearing conducted on April 18, 1996. The problem is that no transcript of that proceeding appears in the certified administrative record. Absent any evidence in the record, the court cannot speculate that Laguerre conceded deportability at that proceeding. In fact, the transcribed proceedings included in the administrative record clearly belie his assertion that a concession was made at the April 18 bond hearing.

To illustrate, on April 25, 1996, one day after the enactment of the AEDPA, the immigration judge in El Paso conducted a hearing. R. 24-26. Laguerre's counsel appeared telephonically. The judge asked Laguerre's counsel whether he was "requesting another week to prepare before entering a pleading in this case." R. 26. Laguerre's counsel answered "Yes, Your Honor." The judge concluded the hearing with a statement clearly indicating no concession had yet been made regarding deportability and a subsequent application for relief: "Then I will schedule the case for Thursday, May 2, 1996 at 11:00 a.m., or at any time thereafter that we can get to it, for the purpose of accepting pleadings, identifying applications for relief, and then scheduling the case for further actions as necessary." *Id.* At the May 2, 1996

hearing, however, the only issues covered were the merits of the motion to change venue. R. 27-33. The judge discussed the parties' respective positions and ruled in favor of Laguerre, ordering that venue be changed to Chicago. R. 32. In sum, the record of the El Paso proceedings does not support Laguerre's contention that he conceded deportability before the enactment of the AEDPA.

The Chicago proceedings further confirm that a concession of deportability was not made before April 24, 1996. The transcribed deportation proceedings resumed on October 3, 1996, over five months after the enactment of the AEDPA. Early in the hearing, the immigration judge posed this question to Laguerre's counsel: "And Mr. Butbul, in the change of venue [hearing] did you concede the allegations and the charge?" R. 36. Laguerre's counsel responded: "Well, we did it over the telephone so I do not remember at that time what has happened [sic]." *Id.* Further, at the point in the proceedings when the immigration judge invited formal pleadings, Laguerre's counsel initially refused to admit the factual allegations in paragraph six. R. 38-39. Although Laguerre's reluctance to admit the allegation was solely based on a clerical inaccuracy in his conviction record, it convincingly demonstrates that a formal pleading had not been submitted. Finally, after the minor clerical error in the conviction record was corrected, Laguerre conceded deportability. R. 40-41. Accordingly, Laguerre did not concede deportability until October 3, 1996.

III. RETROACTIVE APPLICATION OF § 440(d)

Prior to the passage of the AEDPA, Laguerre was eligible to apply for a waiver of deportation pursuant to § 212(c) of the INA, 8 U.S.C. 1182(c) (1994). Section 212(c) authorized the Attorney General to grant waivers of deportation to residents lawfully domiciled in the United States for at least seven years. In other words, the Attorney General could exercise her discretion to allow permanent residents, like Laguerre, to remain in the United States even after commission of a deportable offense. The enactment of § 440(d) of the AEDPA significantly reduced the Attorney General's discretion to grant applications for waiver of deportation. Specifically, the amendment rendered ineligible any alien who had committed: an aggravated felony; a controlled substance offense; certain firearm offenses; convictions of two crimes of moral turpitude; and miscellaneous crimes. AEDPA § 440(d), 110 Stat. 1214, 1277 (amending INA § 212(c), 8 U.S.C. § 1182(c)).

Laguerre's convictions in the Circuit Court of Cook County placed him in the aggravated felon and controlled substance offense categories of § 440(d). Relying on Laguerre's ineligibility for discretionary relief under AEDPA § 440(d), the immigration judge denied Laguerre's application for a waiver of deportation pursuant to former INA § 212(c). The BIA affirmed on this basis. Laguerre argues that the application of § 440(d) to his case is impermissibily retroactive in violation of the due process clause. Section 440(d) can only be viewed as retroactive as applied to Laguerre in two respects. First, § 440(d) could be unconstitutionally retroactive as applied to a pending application for relief. As discussed

above, Laguerre had no waiver application pending on the date of the AEDPA's enactment. Thus, the court need not decide whether § 440(d) was retroactively applied in that regard. Second, § 440(d) could be viewed as unlawfully retroactive as applied to criminal convictions that predate enactment of the AEDPA.[8] Laguerre's criminal convictions on February 23, 1995 predate enactment of the AEDPA.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the Supreme Court reaffirmed the time-honored presumption against statutory retroactivity. In determining whether a statute applies retroactively, the core inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 269-70. *Landgraf* established a two-part analytical framework to guide the court's determination of statutory retroactivity. First, the court must "determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 1505. The "requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. Provided Congress has taken this step, there is no need to further advance the inquiry. If, however, Congress failed to include an express statutory command specifying the statute's temporal reach, as is

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[8] The Seventh Circuit expressly left this issue open in *Reyes-Hernandez*, where the court stated it need not address "the applicability of [sections 440(a) and (d)] to criminal convictions or criminal acts that occurred before the [AEDPA] was passed." 89 F.3d at 493.

the case here, the court takes the next step. The court must consider "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*

In its survey of the jurisprudential history of the presumption against retroactivity, the Supreme Court identified a number of situations where application of new statutes to antecedent events is "unquestionably proper," even in the absence of a clear Congressional command. 511 U.S. at 273. The first illustration offered was statutes that authorize or affect the propriety of prospective relief, such as statutes altering the conditions for injunctive relief. Statutes creating or repealing jurisdiction were another notable example. The Court stated "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Id. at 274. Changes in procedural rules were another apt illustration. Because of the "diminished reliance interests in matters of procedure," these rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity." Id. at 275. In sum, a statute does not have retroactive effect "merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Id. at 269-70.

As an initial matter, Congress did not specify the temporal reach of § 440(d). The AEDPA contains no effective date provision governing § 440(d). The section is therefore deemed effective on the date of enactment. In

consequence, the court moves to the second part of the *Landgraf* analysis: whether § 440(d) violates the presumption against retroactivity. Respondents argue § 440(d) may be constitutionally applied to prior convictions because its amendment to § 212(c) is analogous to a jurisdictional statute or to one affecting the propriety of prospective relief. According to this interpretation, § 440(d) operates only prospectively, as a limitation on the Attorney General's authority to grant discretionary relief to a specified class of candidates for automatic deportation. Respondents find general support in *Landgraf* for this argument. Laguerre characterizes the effect of § 440(d) as retroactive. In Laguerre's view, the amendment to § 212(c) stripped him of a substantive cause of action – the right to apply for discretionary relief from deportation. Laguerre relies on the Supreme Court's recent decisions in *Hughes Aircraft Co. v. United States ex rel. Schumer*, ___ U.S. ___, 117 S. Ct. 1871 (1997) and *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059 (1997).

Respondents' interpretation of § 440(d)'s effect finds overwhelming support in the plain language of the statute and in relevant precedent. The full test of INA § 212(c), as amended by § 440(d), reads:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this

> subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under § 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

8 U.S.C. § 1182(c). The provision plainly defines the contours of the Attorney General's discretion. In other words, § 440(d) makes aliens convicted of enumerated crimes ineligible for relief by limiting the Attorney General's discretion. Nothing in the express language of the provision lends itself to the argument that an application for a waiver is akin to a substantive cause of action. Indeed, unlike the statutory provisions at issue in *Hughes*, § 440(d) does not impair any rights Laguerre had in February 1995, when he committed the drug offenses for which he was convicted.[9] While at that time Laguerre

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[9] Both *Hughes* and *Lindh* are ultimately inapposite because they involved statutory provisions that added new legal consequences to a substantive cause of action. *Hughes* involved an amendment that expanded the scope of *qui tam* actions under the False Claims Act. The Court stated: "In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action. . . . " 117 S. Ct. at 1878. *Lindh*, involved another section of the AEDPA governing standards of review applicable to habeas corpus petitions, 28 U.S.C. § 2254(d). The Supreme Court noted that "the statute goes beyond 'mere' procedure to affect substantive entitlement to relief." 117 S. Ct. at 2063.

could have applied for relief from automatic deportation, he could have claimed no settled expectation in the ultimate granting of discretionary relief. In sum, § 440(d) simply scaled back the Attorney General's prospective discretion to grant a particular form of relief.

This conclusion is bolstered by relevant authority. In *Matter of Soriano,* Int. Dec. 3289 (A.G. Slip. Op. Feb. 21, 1997), the Attorney General addressed whether § 440(d) is retroactive as applied to pending cases. The Attorney General opined that § 440(d) applied to pending cases because it "does not impair a right, increase a liability, or impose new duties on criminal aliens." *Id.* at 4. In arriving at that conclusion, the Attorney General labeled the relief sought in waiver applications as prospective in nature. She found support for this view in the Supreme Court's statement in *INS v. Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984), that: "The deportation hearing looks prospectively to the respondent's rights to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." *Id.* at 5. Furthermore, she compared § 440(d) to a jurisdictional statute because it "speaks to the power of the Attorney General to waive deportation," just as jurisdictional statutes speak to the power of the court. *Id.* Thus, she concluded § 440(d) would not be retroactive as applied to pending cases.[10]

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[10] In keeping with the Seventh Circuit's decision in *Reyes-Hernandez,* the Attorney General did carve out a narrow exception to the rule that § 440(d) applies in pending cases to allow aliens who conceded deportability prior to the enactment of the AEDPA, and who had a colorable defense to deportability, to reopen their cases. A.G. Slip. Op. at 8.

The federal appellate courts' analysis of the retroactivity of past Congressional amendments to § 212(c) is also instructive. Indeed, the AEDPA is not the first time Congress has rendered a class of felons ineligible for § 212(c) relief. The Immigration Act of 1990 rendered aggravated felons, who served at least five years in prison, ineligible to apply for a waiver. § 511(a), Pub. L. No. 101-649, 104 Stat. 4978, 5052 (1990). Aliens challenged the retroactivity of this provision as applied to convictions predating the enactment of the statute. The appellate courts uniformly rejected the contention that its application violated the presumption against retroactivity. *See, e.g., Scheidemann v. INS*, 83 F.3d 1517 (3d Cir. 1996); *Campos v. INS*, 16 F.3d 118 (6th Cir. 1994); *Barreiro v. INS*, 989 F.2d 62 (1st Cir. 1993); *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993); *Osorio v. Fox*, 10 F.3d 1034 (4th Cir. 1993). In describing the nature of the interest effected [sic] by the statute, the courts rejected any claim of a reliance interest in the opportunity to apply for a waiver of deportation. *Kolster v. INS*, 101 F.3d 785, 789 (1st Cir. 1996) (citing cases). In particular, the Third Circuit in *Scheidemann* made the following decisive summary of the nature of discretionary relief under § 212(c):

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to

> remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a judicial body, these changes speak only to the power of a public agency. Finally, like legislation altering procedural rights, the relevant amendments in this case regulate secondary rather than primary conduct and infringe on no significant reliance interest. Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

83 F.3d at 1523. Although the preclusive scope of § 440(d) is much broader than the scope of the 1990 amendment to § 212(c), the nature of discretionary relief remains the same. In both instances, "the availability of purely discretionary relief does not create substantive rights in otherwise deportable aliens." *Kolster,* 101 F.3d at 789.

Another relevant line of authority was recently discussed by the Seventh Circuit in *Chow v. INS,* 113 F.3d 659 (1997). In *Chow,* the Seventh Circuit faced the issue whether § 440(a)'s preclusion of appellate review violated the presumption against retroactivity as applied to pending cases and as to pre-AEDPA criminal conduct. In reaching the conclusion that § 440(a)'s withdrawal of judicial review did not "attach new legal consequences to the alien's [prior criminal] conduct," the court reasoned:

> Courts routinely hold that the INS may lawfully deport an alien under a statute which makes certain conduct a ground for deportation even if the alien engaged in the conduct before the statute went into effect. *Marcello v. Bonds*, 349 U.S. 302, 314, 75 S. Ct. 757, 764, 99 L.Ed. 1107 (1955) (allowing deportation based on conviction that was not a ground for deportation at the time the alien was convicted); *Hamama v. INS*, 78 F.3d 233, 235-36 (6th Cir. 1996) (same); *Ignacio v. INS*, 955 F.2d 295, 298 (5th Cir. 1992) (same); *United States v. Bodre*, 948 F.2d 28, 32-33 (1st Cir. 1991) (same). Accordingly, making deportation a consequence of certain criminal acts does not attach new liabilities or penalties to those acts.

113 F.3d 667. The present case presents an ever stronger claim for a finding of no retroactive effect than do those cited in *Chow*. This is because § 440(d) does not go so far as to alter the primary grounds for deportation. Aliens in Laguerre's particular situation are subject to deportation for the same set of criminal offenses. In sum, "§ 440(d) merely removes one potential means of avoiding deportation" for those offenses. *Gutierrez-Martinez*, 1998 WL at *5; *Vargas*, 966 F.Supp. at 1544.

Two courts have found § 440(d) to be retroactive as applied to criminal conduct predating the enactment of the AEDPA. Both courts have evinced great concern that the provision upsets settled expectations which form the basis for guilty pleas entered by criminal aliens. *See, e.g., Sandoval*, 1997 U.S. Dist. Lexis at *35; *Mojica*, 970 F.Supp. at 176-78. While it is undeniable that immigration consequences may be a factor in a decision to plead guilty, this court is not convinced by *Sandoval* or *Mojica* that the availability of discretionary relief under § 212(c) is the

sole or even a significant motivating factor in decisions to enter guilty pleas. It is a stretch to assume a criminal defendant would forgo a viable criminal defense in order to enter a guilty plea to a crime that makes him subject to automatic deportation, simply for the opportunity to apply for discretionary relief. If anything, the detriment associated with pleading guilty to a particular crime – exposure to deportation proceedings – would seem a substantial disincentive to the guilty plea; or, at the very least, an incentive to plea bargain to a conviction that carries no immigration consequences. Moreover, it is likely that the single greatest determinant in a criminal defendant's choice between a guilty plea and putting on a defense is the expected penal consequences of his actions. Nevertheless, one can imagine a hypothetical scenario where § 440(d) would seem to seriously frustrate the expectations of criminal aliens. *See Mojica,* 970 F.Supp. at 176. The presumption against retroactivity, however, affords no guarantee against upset expectations based in prior law. *Landgraf,* 511 U.S. at 1499. Rather, the question is whether § 440(d) attaches new legal consequences to Laguerre's criminal convictions. For the reasons stated above, this court answers that question in the negative.

IV. MOTION TO REOPEN DEPORTATION PROCEEDINGS

In *Reyes-Hernandez,* the Seventh Circuit recognized an exception to the applicability of § 440(a) and (d) to pending § 212(c) applications. 89 F.3d at 493. The court held that: "sections 440(a) and (d) do not apply to cases in which deportability was conceded before the [AEDPA]

became law, provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* Laguerre cannot avail himself of this limited exception to the application of § 440(d) precisely because he did not concede deportability prior to the date of the AEDPA's enactment. *See Arevalo-Lopez v. INS*, 104 F.3d 100, 101 (7th Cir. 1997) (*Reyes-Hernandez* did not apply where alien contested deportability at the prior hearing). Laguerre did not concede deportability and apply for § 212(c) relief until October 3, 1996, some five months after the date of enactment. Accordingly, there is no basis for granting Laguerre's motion to reopen the deportation proceedings to allow him the opportunity to contest his deportability.

CONCLUSION

Gary Laguerre's petition for writ of habeas corpus is denied. Respondents' motion to dismiss for lack of subject matter jurisdiction is denied. Respondents' motion to dismiss for failure to state a claim is moot. Respondents' motion for summary judgment is granted. Laguerre's cross motion for summary judgment is denied.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

February 17, 1998

APPENDIX J

United States District Court

Northern District of Illinois

Eastern Division

LA GUERRE

v.

RENO, et al.

JUDGMENT IN A CIVIL CASE

Case Number: 97 C 8225

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of respondents Janet Reno, Doris Meissner, and Brian Perryman and against petition [sic] Gary Laguerre.

Michael W. Dobbins, Clerk of Court

/s/ Jacquelyn H. Collier
Jacquelyn H. Collier,
Deputy Clerk

Date: 2/17/98

APPENDIX K

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A40 131 638 – Chicago Date: AUG 1 1997

In re: GARY LAGUERRE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: David Butbul, Esquire
4051 Old Orchard Road
Skokie, Illinois 60076

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997).

You have argued on appeal that your constitutional rights were violated because you were not warned of the potential immigration consequences of your guilty plea. We are without authority to rule on this argument. Neither the Immigration Judge nor this Board may go behind the record of conviction to determine the guilt or innocence of an alien, or the circumstances of his guilty plea and conviction. *See Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).

For these reasons, your appeal is dismissed.

/s/ Neil P. Mille
FOR THE BOARD

APPENDIX L

U.S. DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

Office of the Immigration Judge

In the Matter of: Case No.: A 40 131 638

Gary Laguerre Docket: Chicago

RESPONDENT IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 10-3-96.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

[X] The respondent was ordered deported to Haiti.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to _____ or _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[X] Respondent's application for 212(c) was ( ) granted (X) denied ( ) withdrawn ( ) other.

[ ] Proceedings were terminated.

[ ] The application for adjustment of status under section (216) (216A) (245) (249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Other _____

[X] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

/s/ Illegible
Immigration Judge

Date: 10/3/96

Appeal: RESERVED/WAIVED (A/I/B)

_____

APPENDIX M

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File No.: A 40 131 638 October 3, 1996

In the Matter of)
GARY LAGUERRE) IN DEPORTATION
Respondent) PROCEEDINGS

CHARGE: Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended [8 U.S.C. 1251(a)(2)(A)(iii)] . . . anytime after entry you have been convicted of an aggravated felony . . .

Section 241(a)(2)(B)(a) of the Immigration and Nationality Act, as amended [8 U.S.C. 1251(a)(2)(B)(i)] . . . you have been convicted of a violation of . . . any law relating to a state, the United States, or a foreign country relating to a controlled substance . . .

APPLICATIONS: Waiver under Section 212(c) of the Act.

ON BEHALF OF RESPONDENT:

David Butbul, Esquire
4051 Old Orchard Road
Skokie, Illinois 60076

ON BEHALF OF SERVICE:

Lynn Hollander, Esquire
Assistant District Counsel, INS
10 West Jackson Boulevard
Suite 610
Chicago, Illinois 60604

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is an adult male, native and citizen of Haiti, who last entered the United States on or about August 13, 1985 at Miami, Florida as an immigrant. On February 23, 1995 the respondent was convicted in the circuit court of Cook County for the offense of delivery of controlled substance (cocaine), an aggravated felony, in violation of chapter 720-570/401(C)(2) of the Illinois revised statutes, and on the same date was convicted as well for an offense similar to allegation 5. Count 6 indicates that he was convicted as well on two counts relating to the same occurrence. (*See* Exhibit 6). The respondent was noticed to appear before the Court, having had a hearing initially in El Paso, Texas on April 25, 1996. The matter was continued and the venue was changed to Chicago for the respondent to have his day here. The Service, at that time, objected to the change of venue but apparently did not take an appeal of the interlocutory order of the court. The respondent appeared before the Court today. (*See* Exhibits 2, 3, 4, 5, and 6). The respondent, through counsel, admitted the factual allegations, as contained in the Order to Show Cause, conceded the charge of deportability and also permitted as Exhibit 6, the conviction record. Based on the foregoing, the Court finds deportability has been established by evidence which is clear, convincing, and unequivocal. *Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. 242.14(a).

The respondent, in lieu of an order of deportation, has designated Haiti as the country of deportation, if that were required. The respondent advised the Court that he wishes to apply for a waiver under Section 212(c) of the Act. The respondent's attorney believes that the current

law AEDPA, which is the Anti-Terrorism and Effective Death Penalty Act of 1996, public law 104-32, 110 statutes 1214, has been amended by the current law passed by Congress and signed by the President on September 30, 1996. The Service advises the Court that the effective date of the most recent Act will not take effect until April 1, 1997 and that, in fact, that Act has abrogated the relief of 212(c), as well as suspension of deportation, and has called the future action as cancellation of a removal proceedings, and that the deportation proceedings and exclusion proceedings have been now reclassified as removal proceedings, as such. And she urges the Court not to grant the respondent's motion for a continuance to brief the matter as being moot at this time. The Service urges the Court to note that the Court is bound by the law as it exists at the time of the hearing and may not consider any future actions that may occur. And, therefore, the Court will grant the Service's position that the respondent is not eligible to apply for the waiver, under Section 212(c) of the Act, because of the AEDPA.

We further note that the 7th Circuit, United States Circuit Court of Appeals for the 7th Circuit, has spoken in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. July 17, 1996), holding that Section 440(a) and (d), which bars judicial review of a 212(c) denials and makes most criminal aliens ineligible for a 212(c) relief and they should not apply to criminal aliens who concede deportability with an expectation to present a defense to that deportability prior to the enactment of AEDPA. We do note that the 7th Circuit's decision in that case was narrowly construed, and we do note that the applicant prior to the issuance of AEDPA becoming law had made the pleading. We note

that the respondent here, this case is distinguished because it is occurring after April 24, 1996, and counsel is presumed to know what the law is and that there is no expectation of a colorable relief from deportation under the current law. And, therefore, the Court notes that under these circumstances, his argument is not persuasive.

We note that *Matter of Soriano*, Int. Dec. 3289 (BIA June 27, 1996), was recently vacated by the Attorney General in her decision rendered on September 12, 1996, indicating that a prior application pending prior to the effective date of the Act would not be permitted to go forward as the Board had indicated, heretofore. We do note that the 5th and the 9th Circuit, apparently, has held that a 212(c) hearing is blocked by AEDPA. We note that in *Mendez-Rosas*, INS 1996 U.S. Apc. [sic] LEXIS 15319 (5th June 16, 1996), apparently held that AEDPA would block an application for a 212(c) waiver. We understand that the 9th Circuit has also similarly ruled in that arena as well. The 7th Circuit has not indicated the constitutionality of the Act and the Court notes that in *Lopez-Mendoza v. INS*, citation omitted, that the Supreme Court Justice Sandra Day O'Connor had indicated that neither the Immigration Judge nor the Board of Immigration Appeals has competency to rule in the area of constitutionality of an act of Congress. And the Court notes, therefore, that the presumption of regularity and constitutionality must prevail here.

Considering the above, the Court finds that it's meet [sic] and proper to enter the following order;

ORDER

IT IS HEREBY ORDERED that the respondent's request for a waiver under Section 212(c) of the Act be, and the same is hereby denied, since lack of eligibility.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Haiti on the charges contained in the Order to Show Cause.

/s/ _____
O. JOHN BRAHOS,
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE O. JOHN BRAHOS

in the matter of:

GARY LAGUERRE

A 40 131 638

Chicago, Illinois

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Helen Lewis
(Helen Lewis, Transcriber)

Deposition Services, Inc.
600 East Jefferson Street
Suite 103
Rockville, Maryland 20852
(301) 738-1042

November 6, 1996
(Completion Date)

APPENDIX N

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 9, 1999

Before

Hon. Richard A. Posner, Chief Judge

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

GARY LAGUERRE, *Petitioner-Appellant,* v. JANET RENO, et al., *Respondents-Appellees.* and JOSE MARTIN AVELAR-CRUZ, *Petitioner-Appellee,* v. JANET RENO, et al., *Respondents-Appellants.*	} Appeals from the United States District Court for the Northern District Illinois, Eastern Division. } Nos. 97 C 8225 and 98 C 1193 } Suzanne B. Conlon, *Judge.*

ORDER

On January 25, 1999, petitioners filed a petition for rehearing with suggestion for rehearing *en banc* and on February 10, 1999, respondents filed a [sic] answer. A vote of the active members of the Court was requested,

and a majority has voted to deny a rehearing en banc.* The petition is therefore **DENIED.**

---

* Hon. Kenneth F. Ripple, Hon. Ilana Diamond Rovner and Hon. Diane P. Wood voted to grant the petition for rehearing en banc.

APPENDIX O

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

(Filed April 20, 1999)

Date: December 22, 1998

BEFORE: Honorable RICHARD A. POSNER, Chief Judge

Honorable HARLINGTON WOOD, JR., Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

No. 98-1954

GARY LAGUERRE,

Petitioner - Appellant

v.

JANET RENO, DORIS MEISSNER and BRIAN R. PERRYMAN,

Respondents - Appellees

No. 98-2613

JOSE MARTIN AVELAR-CRUZ,

Petitioner - Appellee

v.

JANTE [sic] RENO, BRIAN PERRYMAN, DORIS MEISSNER, et al.,

Respondents - Appellants

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 97 C 8225 & 98 C 1193,
Suzanne B. Conlon, Judge

The judgment in LaGuerre's case is MODIFIED to base dismissal on want of jurisdiction, and the judgment in Alvelar-Cruz's [sic] case is REVERSED with instructions to dismiss the action, also for want of jurisdiction, in accordance with the decision of this court entered on this date.

APPENDIX P

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. The Due Process Clause of the United States Constitution, Amend. V, provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

3. Article III of the United States Constitution, Art. III, § 1, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

4. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1995), provided in pertinent part:

> **Exclusiveness of Procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, United

States Code, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this title or pursuant to section 242A of this title or comparable provisions of any prior Act, except that –

* * *

(10) Habeas Corpus

Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

5. Effective April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that –

* * *

(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for

which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

6. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1995), provided:

Nonapplicability of Subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

7. Effective April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of

subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

8. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS. – Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended –
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

9. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996), provides in pertinent part:

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW. – Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * *

(d) CLASSES OF EXCLUDABLE ALIENS. – Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended –

> (1) by striking "The first sentence of this" and inserting "This"; and
>
> (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

10. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as

amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL. – Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5), this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS. –

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective Date –

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW. – In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –

* * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

11. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

APPENDIX Q

[seal omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Matter of Soriano, BIA. Int. Dec. No. 3289 (1996)

IN DEPORTATION PROCEEDINGS

At the request of the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals ("BIA") referred its decision in this matter pursuant to 8 C.F.R. § 3.1(h)(iii). Respondent Soriano, a native and citizen of the Dominican Republic, was admitted to the United States in 1985 as a lawful permanent resident alien. In 1992, he was convicted under New York law of the offense of an attempted sale of a controlled substance. Based on that conviction, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against him in 1994.

In 1995, Respondent sought the relief of waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *DeOsorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993). The Immigration Judge found that the respondent was eligible for that relief, but, in the exercise of discretion, denied his application. *See Matter of Soriano*, File No. A39 186 067 (Executive Office

for Immigration Review ("EOIR"), Office of the Immigration Judge, Oct. 12, 1995). Respondent appealed from that decision on October 23, 1995.

On April 24, 1996, while Respondent's appeal was pending, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c). The amendment provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses. Respondent's offense is among those specified.[11] Thus, a threshold issue on appeal was whether the amendment to section 212(c) applied to foreclose Respondent's application for relief from deportation.[12]

---

[11] The amendment provides in relevant part that section 212(c) relief shall not be available to an alien who "is deportable by reason of having committed any criminal offense covered in (INA) section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." 110 Stat. at 1277, as amended by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. Vol. 9B (110 Stat.) 1672. Respondent's offense is covered by sections 241(a)(2)(A)(iii) and (B) of the INA. *See* 8 U.S.C. § 1251.

[12] It is important to note as a threshold matter that deportation proceedings are civil actions, and, thus, the constitutional bars to retroactive application of penal legislation do not apply. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952). Moreover, it is well settled that Congress may legislate to alter the

The BIA was unanimous in concluding that AEDPA § 440(d) was effective immediately upon enactment on April 24, 1996. The BIA was divided, however, as to whether AEDPA § 440(d) applied to applications for section 212(c) relief that were pending on the effective date of AEDPA. Six members of the BIA concluded that Congress did not intend that aliens who had applicants pending on April 24, 1996, should be barred from seeking that relief. Accordingly, they found that Respondent continued to be eligible for waiver of inadmissibility.[13] Five members of the BIA dissented. They would have held that section 440(d) did apply to pending applications for section 212(c) relief. One member of the BIA concurred in part and dissented in part. That member agreed with the majority that AEDPA § 440(d) should not be applied to pending section 212(c) applications, but would also have declined to apply it to other cases, such as those of permanent resident aliens subject to an Order to Show Cause.

For the reasons stated below, I conclude that the amendment to INA § 212(c) made by AEDPA § 440(d) applies to proceedings such as Respondent's, in which an

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immigration consequences of past criminal convictions or acts. *Lehman v. Carson*, 353 U.S. 685, 690 (1957); *Mulcahey v. Catalanotte*, 353 U.S. 692, 694 (1957).

[13] The majority agreed with the Immigration Judge's conclusions that Respondent's attempted criminal sale of cocaine, together with his three other drug-related felonies, required a demonstration of outstanding equities before he could receive a waiver of inadmissibility, and that Respondent had not made such a demonstration.

application for relief under section 212(c) was pending when AEDPA was signed into law.[14]

Analysis

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court sought to "reconcile two seemingly contradictory statements found in [the Court's] decisions concerning the effect of intervening changes in the law": that " 'a court is to apply the law in effect at the time it renders its decision,' " and that " '[r]etroactivity is not favored in the law.' " *Id.* at 263-64 (citations omitted).

The Court set forth the method for analyzing the temporal reach of a statute:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the

---

[14] By Order dated September 12, 1996, I granted the request for review and vacated the opinion of the BIA in Matter of Bartolome Jhonny Soriano (A39 186 067).

> statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

In the present case, nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be. Thus, the next task is to determine whether the statute would be given retroactive effect if applied in pending deportation proceedings. In this regard, the Court observed that "[w]hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70 (citation and footnote omitted).

Of particular relevance here, the Court suggested that changes in the law affecting prospective relief, as well as those affecting jurisdiction and procedure, are generally not to be considered "retroactive." Specifically, the Court said:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not

> retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court.

Id. at 273-74.

Similarly, the three separately concurring Justices (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment), emphasized that intervening law was typically applied to pending applications for prospective relief:

> Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operated only *in futuro*." Since the purpose of prospective relief is to affect the future rather than to remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.

Id. at 293 (citations omitted).

Both the majority and concurring Justices identified another set of intervening statutes – those that confer or eliminate jurisdiction – that do not operate retroactively

merely because they are applied to conduct arising before the statute's enactment. Justice Scalia explained the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction . . . by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. 286, 292-93 (Scalia, J. concurring).[15]

In summary, under *Landgraf*, a new statute does not have retroactive effect if it does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be

---

[15] The single dissenting Justice in *Landgraf* was of the opinion that the presumption against retroactive legislation, "which serves to protect settled expectations," and which "is grounded in a respect for vested rights," "need not be applied to remedial legislation . . . that does not proscribe any conduct that was previously legal." *Id.* at 296-97 (Blackmun, J., dissenting) (citing *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 238 (1833) ("Almost every law, by providing a new remedy, affects and operates upon causes of action existing at the time the law is passed") and *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."), *cert. denied*, 449 U.S. 905 (1980)).

applied in pending cases. As discussed below, the application of AEDPA § 440(d) to pending applications for section 212(c) relief does not impair a right, increase a liability, or impose new duties or criminal aliens. The consequences of Respondent's conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation. AEDPA § [440(d)] is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief.[16]

The relief sought in a section 212(c) application, waiver of inadmissibility, is prospective in nature. A successful applicant for relief under section 212(c) will not,

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[16] One formulation articulated in *Landgraf* for determining whether a statute operates retroactively – "whether [it] attaches new legal consequences to events completed before its enactment" – could be interpreted as compelling the conclusion that AEDPA § [440(d)] should not be applied to pending applications for section 212(c) relief. *Id.* at 269-70. Because the statute eliminates eligibility for a previously available form of relief from the immigration consequences of a prior criminal conviction, it could be argued that it attaches new legal consequence to a prior event. Elimination of a form of relief in this context, however, is not the same as the attachment of new legal consequences in the sense that the Court meant in *Landgraf*. If it were, most cases in the three categories that the Court identified as not constituting retroactive application when applied to past events – statutes that alter jurisdiction, procedural rules, and statutes affecting the availability of prospective injunctive relief – would also have to be understood as attaching new legal consequences to prior events and, hence, constituting retroactive application.

as a matter of the sovereign's discretion, be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain."); *DeOsorio v. INS* 10 F.3d at 1042 (holding that an amendment barring applications for waivers of deportations filed after the effective date of the amendment to 212(c) is not made retroactive merely because it applies to convictions for aggravated felonies before that time: "The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief. . . . Congress did not attach additional consequences, but merely withdrew a previously available form of discretionary relief.").

Moreover, Congress's modification of section 212(c) operates to eliminate the discretionary authority of the Attorney General to grant relief in certain cases, and, thus, its effect is to remove jurisdiction. As the Solicitor General argued in the brief of the United States of the Supreme Court in *INS v. Elramly*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1260, and *vacated*, 117 S. Ct. 31 (1996), a case raising the issue whether AEDPA divested the Attorney General of authority to grant section 212(c) relief in pending cases, "[j]ust as new 'jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties,' " *Landgraf*, 511 U.S. at 274, section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to such relief." Supplemental Brief for the

Petitioner at 18. The majority opinion in *Landgraf* explains the practice of applying new jurisdictional statutes to pending cases by the fact that "a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Id.* at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, in contrast to the cases cited by the Court, there is no alternative tribunal to which the criminal alien may petition. Even assuming that the lack of an alternative tribunal would be relevant to retroactivity analysis where a substantive right is at stake, eligibility for a congressionally created form of purely discretionary relief from the immigration consequences of a prior criminal conviction cannot properly be characterized as a substantive right.[17]

The Third Circuit's discussion of the application of an earlier amendment to section 212(c) to make an applicant ineligible for relief based on a prior criminal conviction applies equally here:

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and

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[17] The concurring opinion further notes that while there may sometimes be an alternative forum, there is not always one, and even where there is, it may deny relief for some collateral reason such as a statute of limitations bar. "Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J. concurring).

> deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a judicial body, these changes speak only to the power of a public agency. . . . Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

Scheidemann v. INS, 83 F.3d 1517, 1523 (3rd Cir. 1996).

The Seventh Circuit has expressed a contrary view in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), at least with respect to a narrow category of cases. In that case the petitioner had conceded deportability before the enactment of AEDPA, when he was still eligible for section 212(c) relief. The court speculated that had the petitioner known that this relief would no longer be available to him, he might have contested deportability.

> Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability

> by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence.

Id. at 492-93. The court held that section 440(d) of AEDPA does not apply to cases in which deportability was conceded before AEDPA became law, "provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* at 493.[18]

Amici curiae in the current case also emphasized the reliance aliens may have placed on the availability of section 212(c) relief. Amici argue that aliens may rely on the possibility of obtaining section 212(c) relief not only when deciding whether to contest deportability, but also when deciding whether to litigate their criminal liability or enter into a plea agreement. It is true that the majority opinion in *Landgraf* notes that "familiar considerations of fair notice, reasonable reliance, and settled expectations" are factors offering "sound guidance" in "hard cases." *Landgraf*, 511 U.S. at 270. However, the Court states

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[18] The Seventh Circuit has confirmed that *Reyes-Hernandez* applies only in cases where the petitioner conceded deportability and had a colorable defense to deportability. *Arevalo-Lopez v. INS*, No. 96-1754, 1997 WL 1898, at *2 (7th Cir., Jan. 3, 1997).

expressly that a statute does not operate retroactively merely because it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 270.

In any event, it is difficult to see how the possibility of obtaining section 212(c) relief would affect an alien's decision whether to concede or contest deportability. First, the criteria for determining whether someone is deportable as a criminal alien are specific and fixed, and the grounds for challenging deportability are quite narrow. *See Rabiu v. INS*, 41 F.3d 879, 881 (2d Cir. 1994) (record of conviction sufficient to overcome alien's challenge to deportability); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995) (criminal convictions may not be collaterally challenged in deportation proceeding as ground for contesting deportability). Second, an alien need not choose between contesting deportability and seeking section 212(c) relief; an alien may pursue both.

It seems more plausible that an alien may enter a plea bargain hoping to obtain relief from deportation, but even so, the alien could not have reasonably relied upon the availability of that relief. For the past forty years, the law has been settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. Moreover, as the Supreme Court recently unanimously reaffirmed in the context of analyzing a similar provision conferring discretionary authority upon the Attorney General, "suspension of deportation [is] . . . 'an act of grace' which is accorded pursuant to her 'unfettered discretion' and is similar to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.' " *INS v. Yueh-Shaio Yang*, 117 S. Ct.

350, 352-53 (1996) (citations omitted). Therefore, a criminal alien could not reasonably rely on the availability of section 212(c) relief in determining whether to plead guilty to a criminal offense or in determining whether to concede deportability.

Accordingly, the application of AEDPA § 440(d) to section 212(c) applications pending before the EOIR would not be retroactive. However, to eliminate even the remote possibility that an alien who had a colorable defense to deportability may have conceded deportability in reliance on the availability of section 212(c) relief, I direct the EOIR to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability.

CONCLUSION

For the foregoing reasons, AEDPA § 440(d) should be applied to INA § 212(c) cases pending before the EOIR on the effective date of AEDPA. EOIR shall reopen cases upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability.

Date: February 21, 1997

/s/ JANET RENO
JANET RENO
Attorney General